

FRAMEWORK ORIGINALISM AND THE LIVING CONSTITUTION

*Jack M. Balkin**

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INTRODUCTION

Original meaning originalism and living constitutionalism are compatible positions. In fact, they are two sides of the same coin. Although not all versions of these theories are compatible, the most intellectually sound versions of each theory are. Recognizing why they are compatible helps us understand how legitimate constitutional change occurs in the American constitutional system. The first Part of this Article offers a short summary of what I believe is the best account of original meaning originalism and what I regard as its central purpose: setting up a basic structure for govern-

* Knight Professor of Constitutional Law and the First Amendment, Yale Law School. My thanks to Bruce Ackerman, Steve Calabresi, Barry Friedman, Mark Graber, Sandy Levinson, Robert Post, Scott Shapiro, and Reva Siegel for their comments on previous drafts.

ment, making politics possible, and creating a framework for future constitutional construction.

The second Part of the Article tries to rethink what we mean by a “living” Constitution. I believe that living constitutionalism, properly understood, implies something different from what most advocates and critics of living constitutionalism have assumed. It is not primarily a theory about how judges should interpret the Constitution. First, it is not a theory of constitutional interpretation—in the limited sense of ascertaining constitutional meaning—but a theory of constitutional construction—that is, the process of building institutions of government and implementing and applying the constitutional text and its underlying principles. Second, it is not primarily addressed to judges but to all citizens. Third, it does not give detailed normative advice about how to decide particular cases. Rather, it explains how constitutional change occurs through interactions between the political branches and the courts, and why and to what extent this process is democratically legitimate.

I. FRAMEWORK ORIGINALISM AND SKYSCRAPER ORIGINALISM

I begin by contrasting two ideal types of originalism, one I will call framework originalism and the other skyscraper originalism.¹ As the names imply, these two types of originalism differ in the degree of constitutional construction and implementation that later generations may engage in.² Skyscraper originalism views the Constitution as more or less a finished product, albeit always subject to later Article V amendment. It allows ample room for democratic lawmaking to meet future demands of governance; however, this lawmaking is not constitutional construction. It is ordinary law that is permissible within the boundaries of the Constitution. Framework originalism, by contrast, views the Constitution as an initial framework for governance that sets politics in motion and must be filled out over time through constitutional construction. The goal is to get politics started and keep it going (and stable) so that it can solve future problems of governance. Later generations have a lot to do to build up and implement the Constitution, but when they do so they must always remain faithful to the basic framework. Put in terms of Article V, skyscraper originalism views amendment as the only method of building the Constitution, while framework originalism sees a major role for constitutional construction and implementation by the political branches as well as by the Judiciary.

¹ Cf. T. K. SEUNG, INTUITION AND CONSTRUCTION: THE FOUNDATION OF NORMATIVE THEORY 194–99 (1993) (distinguishing between “bedrock” and “skyscraper” accounts of political ideals). Although drawn for quite different purposes, Seung’s distinction, and his related concept of the “constrained indeterminacy” of human values, is quite relevant to how originalism works. See T. K. SEUNG, PLATO REDISCOVERED: HUMAN VALUE AND SOCIAL ORDER 291–92 (1996) (noting concept of “constrained indeterminacy” of meaning).

² On the concept of constitutional “construction,” see the discussion *infra* Part II.

For the same reasons, skyscraper originalism and framework originalism offer different accounts of the democratic legitimacy of constitutional construction. In skyscraper originalism, the political branches do not construct the Constitution; they engage in ordinary politics within its boundaries (unless they self-consciously pursue Article V amendment). Similarly, judicial review is consistent with democracy when and only when it enforces the original bargain laid out in the Constitution and subsequent amendments, and otherwise leaves ordinary politics alone. In framework originalism the story is quite different. The political branches and the Judiciary work together to build out the Constitution over time. Their authority to engage in constitutional construction comes from their joint responsiveness to public opinion over long stretches of time while operating within the basic framework. In doing so, they inevitably reflect and respond to changing social demands and changing social mores.

Finally, framework originalism and skyscraper originalism offer contrasting accounts of how to constrain judicial behavior. In skyscraper originalism judges are constrained when they apply the original constitutional bargain using the proper methodology for ascertaining it; when they fail to do this they are unconstrained and are simply imposing their own beliefs. Thus skyscraper originalism views following correct interpretive methodology as the central constraint on judges. Framework originalism also requires that judges apply the Constitution's original meaning. But it assumes that this will not be sufficient to decide a wide range of controversies and so judges will have to engage in considerable constitutional construction as well as the elaboration and application of previous constructions. Hence fidelity to original meaning cannot constrain judicial behavior all by itself. The most important restraints on judges engaged in constitutional construction will not come from following proper interpretive theories but rather from *institutional* constraints. These include the moderating effects of multimember courts, in which the balance of power rests in moderate or swing judges, the screening of candidates through the federal judicial appointments process, social and cultural influences on the Judiciary which keep judges attuned to popular opinion, and professional legal culture and professional conceptions of the role of the Judiciary.

Let me connect the distinction between framework and skyscraper originalism to the interpretive theory I have been developing over the past few years, which is both originalist and supports the notion of a living constitution.³ I argue that original meaning originalism and living constitutionalism are not only not at odds, but are actually flip sides of the same coin. I call this theory of interpretation the method of text and principle. The basic idea is that interpreters must be faithful to the original meaning of the con-

³ See Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291 (2007) [hereinafter Balkin, *Abortion and Original Meaning*]; Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427 (2007) [hereinafter Balkin, *Constitutional Redemption*].

stitutional text and to the principles that underlie the text. But fidelity to *original meaning* does not require fidelity to *original expected application*.⁴ Original expected application is merely evidence of how to apply text and principle. Each generation is charged with the obligation to flesh out and implement text and principle in their own time. They do this through building political institutions, passing legislation, and creating precedents, both judicial and nonjudicial. Thus, the method of text and principle is a version of framework originalism and it views living constitutionalism as a process of permissible constitutional construction.

The term “original meaning” can be confusing because we use “meaning” to refer to at least five different things: (1) semantic content (e.g., “what is the meaning of this word in English?”); (2) practical applications (“what does this mean in practice?”); (3) purposes or functions (“the meaning of life”); (4) specific intentions (“I didn’t mean to hurt you”); or (5) associations (“what does America mean to me?”).⁵

Thus, when we ask about the “meaning” of the Equal Protection Clause, we could be asking: (1) What concepts the words in the clause point to; (2) how to apply the clause; (3) the purpose or function of the clause; (4) the specific intentions behind the clause; or (5) what the clause is associated with in our minds or, more generally, in our culture.

Fidelity to “original meaning” in constitutional interpretation refers only to the first of these types of meaning: the semantic content of the words in the clause. We follow the original meaning of words in order to preserve the Constitution’s legal meaning over time, as required by the rule of law. Otherwise, if the dictionary definitions of words changed over time, their legal effect would also change, not because of any conscious act of lawmaking (or even political mobilization), but merely because of changes in language. So, for example, when Article IV says that the United States must protect the states from “domestic violence,”⁶ we should employ the original meaning, “riots” or “insurrections,” not the contemporary meaning, “spousal assaults.”

Fidelity to original meaning does not, however, require fidelity to any of the other types of original meaning, although these forms of meaning may be relevant evidence of original semantic content. More to the point, these other kinds of meaning may be very important for purposes of constitutional construction.

Fidelity to original meaning as original semantic content does not require that we must apply the Equal Protection Clause the same way that people at the time of enactment would have expected it would be applied.

⁴ See Balkin, *Abortion and Original Meaning*, *supra* note 3, at 292; Balkin, *Constitutional Redemption*, *supra* note 3, at 433–34.

⁵ See Lawrence B. Solum, *Semantic Originalism* (Illinois Pub. Law Research Paper No. 07-24, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244.

⁶ U.S. CONST. art. IV, § 4.

It does not require that we must articulate the purposes or functions of the clause in exactly the same way the Framers and ratifiers would have or apply it only consistent with their specific intentions.⁷ Finally, it does not mean that the clause can only have the same associations to us that it had to the adopting generation. Today, for example, the clause is associated with many things in our minds and our political culture—like Dr. Martin Luther King and the civil rights revolution—that the adopting generation could not have known about. These four other types of original meaning may be quite relevant to constitutional construction, and to how we should create and apply legal doctrines. But they are not dispositive on these questions.

To be faithful to original meaning in the sense I am concerned with, we need to know the concepts that the words in the Equal Protection Clause referred to when it was originally enacted. This is not purely an investigation into semantic definitions. We also want to know if words in the clause were understood nonliterally—for example, as a metaphor or a synecdoche⁸—and we want to know whether some words referred to generally recognized terms of art.⁹ If the text states a determinate rule, we must apply the rule in today's circumstances. If it states a standard, we must apply the standard. And if it states a general principle, we must apply the principle.

I argue that this approach follows from paying attention to the reasons why constitutional designers choose particular language. Sometimes drafters choose to express themselves in clear rules, creating hard-wired features that are relatively determinate. Sometimes they use standards, and sometimes they articulate principles. These standards and principles can be broad, abstract, or vague. Then we have to implement them through practice, through state-building, or through precedents. And sometimes the drafters of a constitution deliberately say nothing at all about a particular issue. Then we must fill in the details where they were silent.

I argue that the choice of rules, standards, principles, or silence is not accidental. Constitutional drafters use rules because they want to limit discretion; they use standards or principles because they want to channel politics but delegate the details to future generations.¹⁰ They leave things silent for any number of reasons: because certain matters go without saying, because they are implicit in the structure of the constitutional system, because the adopters could not decide among themselves how to resolve a particular

⁷ That we are not bound by the specific purposes of the adopters is especially important in the case of structural arguments, and in the case of textual commitments to unenumerated rights, for example, in the Ninth Amendment and the Privileges or Immunities Clause of the Fourteenth Amendment. Some structural arguments depend on events that occurred after enactment, and unenumerated rights by their nature cannot be detailed in advance. See Balkin, *Constitutional Redemption*, *supra* note 3, at 502.

⁸ See Balkin, *Abortion and Original Meaning*, *supra* note 3, at 304; Balkin, *Constitutional Redemption*, *supra* note 3, at 491–93.

⁹ See Balkin, *Abortion and Original Meaning*, *supra* note 3, at 304; Balkin, *Constitutional Redemption*, *supra* note 3, at 491–93.

¹⁰ See Balkin, *Constitutional Redemption*, *supra* note 3, at 457–61.

issue and therefore handed the problem off to the future, or because the adopters simply wanted to leave space for later generations to design and build institutions appropriate to the situations they would face.¹¹

A very familiar argument for constitutionalism is that it seeks to limit future discretion and prevent future generations from making bad decisions or straying from good values. Although some constitutional features have this purpose and effect, I do not believe that this is the best general argument for constitutionalism. Constitutions are designed to create political institutions and to set up the basic elements of future political decisionmaking. Their basic job is not to prevent future decisionmaking but to enable it. The job of a constitution, in short, is to make politics possible. That is why constitutions normally protect rights and create structures.

Both rights protections and structural protections are necessary to construct a workable political sphere and to support a civil society in which politics—and everyday life—can occur. Not every form of politics is equally acceptable; together rights and structure shape social and political relations, the kinds of things that people can do to each other, and the duties they owe to one another. Similarly, without some structural or rights protections for institutions of civil society, a decent form of politics is not possible. Moreover, the Constitution's ability to maintain a peaceful and stable politics ultimately depends on civil society and its related institutions; hence the Constitution must do its part to help protect and foster them. Finally, some people, perhaps most, may not want to be actively engaged in political life except perhaps for voting at regular intervals; ordinarily they may not be roused to political action unless they feel the country has gone seriously wrong or rights they regard as very important have been violated. A political constitution helps them to live peacefully with others in civil society by requiring the state—and other people—to respect their rights and to act fairly and nonarbitrarily toward them.

From a design perspective, the use of different types of legal norms and silences makes perfect sense. Sometimes, designers use rules to set up the basic framework of institutions. They do this not merely to assign roles and tasks or to conclusively limit or grant power. Rather, as the American Constitution imagines, designers might use rules to place different parts of the government in competition with each other, producing an indeterminate result. As I discuss later on, this is how the American system of living constitutionalism works in practice.

Constitution-makers from the American Constitution to the present day have also included rights guarantees that sound in the vague and abstract language of principles. This choice of language makes little sense if the purpose of constitutionalism is to strongly constrain future decision-making. It makes far more sense if the goal is to channel politics, by creat-

¹¹ *Id.*

ing a set of key values and commitments that set the terms of political discourse, and that future generations must attempt to keep faith with. Abstract rights provisions are valuable even if their contours are not fully determined in advance. They shape the way that political actors understand and articulate the values inherent in the political system; they shape the beliefs of political actors about what they can and cannot do, what they are fighting for and what they are fighting against.¹²

Finally, constitutional silences and open spaces reflect the fact that adopters are not omniscient and cannot prepare for every eventuality. Future generations must build up institutions and practices to make politics and governance possible and successful in changing circumstances; they must adapt as the country faces new problems and new opportunities created by changes in foreign threats, technology, economic conditions, culture, and demographics.

To see how these ideas about constitutional language work in practice, consider the different sections of the Fourteenth Amendment, sent to the states together in 1866 and ratified in 1868.¹³ Section 1 of the Amendment is the most familiar to us today: its first sentence offers a fairly clear and determinate rule for citizenship, which was added at the last minute.¹⁴ But most of Section 1 is written in abstract and vague language combining standards, principles, and terms of art. It speaks of “privileges or immunities of citizens of the United States,” “due process of law,” and “equal protection of the laws.”¹⁵ The reason for this is clear: The Framers of the Fourteenth Amendment understood Section 1 as a statement of general principles and they wanted to leave open certain questions—including the tricky questions of racial segregation, miscegenation, and black suffrage—to a later time.¹⁶ They wanted to offer a general statement of principles about the rights of citizens—not limited to questions of black equality—that would no doubt be filled out by courts and especially by Congress, acting under its enforcement powers under Section 5.

With the glittering generalities of Section 1, contrast the more rule-bound and hardwired features of Sections 2, 3, and 4. Section 2 finesses the problem of black suffrage in a compromise: states that denied black men the right to vote would have a proportionate share of their population un-

¹² See *id.* at 459–61.

¹³ See U.S. CONST. amend. XIV.

¹⁴ U.S. CONST. amend. XIV, § 1.

¹⁵ *Id.*

¹⁶ See WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 143–45 (1988) (arguing that the Framers of the Fourteenth Amendment deliberately used language containing broad principles, leaving specific applications to future generations to work out); Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 59–63 (1955) (moderates and radicals chose open-ended “language capable of growth” that papered over their differences and allowed them to present a unified front that would appeal to a wide range of constituencies).

counted for purposes of calculating representation in the House and in the Electoral College.¹⁷ Section 3 bars former rebels from holding federal and state offices unless Congress, “by a vote of two-thirds of each House, remove[s] such disability.”¹⁸ Section 4 guarantees recognition of the debt of the Union in conducting the war and prohibits the government from paying off any of the debt of the Confederacy; it also extinguishes any property claims of former slaveholders.¹⁹

Why would the very same Congress that used abstract standards and principles in Section 1 use such different language in Sections 2, 3, and 4? The Fourteenth Amendment was an armistice that set out the new rules of politics following the Civil War.²⁰ It was truly a “Reconstruction” amendment in every sense of the word. Therefore, it set up relatively clear rules about how to resolve key unsettled issues of the war in Sections 2, 3, and 4, while declaring (and thus leaving open for future specification) the scope of the rights protected in Section 1.

The Fourteenth Amendment, which is part of our country’s second Founding, contains in a microcosm the various different uses of constitutional language—and the purposes behind them—that exist in most constitutions, including our own. The choice of rules, standards, principles, and silences in this Amendment makes sense when we look at it from the perspective of the drafters, who constrained some things and left others open in the hopes that politics could flourish in the wake of a devastating Civil War.

So too, the 1787 Constitution is a framework for government responding to the widely acknowledged failures of the Articles of Confederation and the need to confront a panoply of dangers and problems, some foreign and some domestic. It was a blueprint for a “more perfect union”²¹ that left much to be worked out in time; and indeed, controversies about how to build out the country’s political and governing institutions began almost as soon as the ink was dry. Within three decades, for example, the new country had to figure out, among other things, whether it had the power to acquire new territory, whether it could spend for the relief of citizens in particular localities rather than the country as a whole, and whether it could

¹⁷ See U.S. CONST. amend. XIV, § 2. The Fourteenth Amendment’s silence on the question of black suffrage left open space for Congressional action. In 1867 and 1868, while the Fourteenth Amendment was still before the states, Congress passed a series of Reconstruction Acts: Act of March 2, 1867, ch. 153, 14 Stat. 428; Act of March 23, 1867, ch. 6, 15 Stat. 2; Act of July 19, 1867, ch. 30, 15 Stat. 14; Act of March 11, 1868, ch. 25, 15 Stat. 41. These required states in the former Confederacy to hold new constitutional conventions in which blacks could vote for delegates, leading to new state constitutions that secured black suffrage in the South. The Fifteenth Amendment finally granted black males the right to vote throughout the United States in 1870. U.S. CONST. amend. XV, § 1.

¹⁸ U.S. CONST. amend. XIV, § 3.

¹⁹ U.S. CONST. amend. XIV, § 4.

²⁰ See Balkin, *Constitutional Redemption*, *supra* note 3, at 456.

²¹ U.S. CONST. pmbl.

create financial institutions like a national bank.²² In some cases, such as the 1800 election,²³ the blueprint proved inadequate and so new amendments were necessary. Even before this, a declaration of rights, phrased in suitably vague and abstract terms, was the price of ratification.

A theory of originalism that takes this designer's perspective sees the initial versions of a constitution as primarily a framework for governments, a skeleton on which much will later be built. We look to original meaning to preserve this framework over time, but it does not preclude us from a wide range of possible future constitutional constructions that implement the original meaning and that add new institutional structures and political practices that are not inconsistent with it. This approach is the essence of framework originalism. In this model of originalism, the Constitution is never finished, and politics and judicial construction are always building up and building out new features.

The contrasting position, which I call skyscraper originalism, assumes that the purpose of the Constitution is to constrain foolish and unwise decisionmaking in the future. The Constitution is a bulwark, largely finished, bequeathed to future generations to prevent them from falling prey to human folly, base motivations, temptation, and decline.²⁴ The goal is not to create space for institutional growth but to prevent abandonment of basic norms. Given this overarching goal, we should interpret the Constitution to resolve as many of the details as possible, dividing up clearly what is left to the political process and what is not. The Constitution may in fact leave a great deal up to everyday politics; however, absent the use of the amendment process, these political decisions do not add anything significant to the constitutional plan. They occur as permissible activity within the plan.

Skyscraper originalism produces a somewhat different take on what a commitment to "original meaning" requires. For example, it becomes important to turn abstract and vague rights provisions into something as determinate and rule-like as possible. Only then will these provisions properly do their job of constraining unconstitutional action and demarcating the space in which ordinary politics—as opposed to constitution-

²² See DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS 1801–1829*, at 87–107, 250–58, 290–95 (2001).

²³ See BRUCE ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY* (2005) (explaining how the Constitution's original model of presidential election produced a constitutional crisis).

²⁴ See Jon Elster, *Intertemporal Choice and Political Thought*, in *CHOICE OVER TIME* 35 (George Loewenstein & Jon Elster eds., 1992) (discussing constitutions as precommitment devices); Stephen Holmes, *Precommitment and the Paradox of Democracy*, in *CONSTITUTIONALISM AND DEMOCRACY* 195 (Jon Elster & Rune Slagstad eds., 1988) (discussing historical arguments for and against the use of precommitment devices in constitutions); ANTONIN SCALIA, *Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 40–41 (Amy Gutmann ed., 1997) (“[A constitution’s] whole purpose is to prevent change—to embed certain rights in such a manner that future generations cannot readily take them away.”).

building—may proceed. One way to do this is to identify the original meaning as closely as possible with the original expected application. That way we do not have to leave the scope and application of rights provisions to later generations. Interpreting rights provisions this way may not prevent very much, and it may greatly hamstring the powers of the federal government; but at the very least it will prevent future generations from abandoning the concrete value commitments and expectations of the adopting generation.

Thus, for example, we might decide that the Cruel and Unusual Punishments Clause bans only those punishments that the generation of 1791 thought were cruel and unusual. This does not ban very much from our present day perspective, but it does protect us from a later, crueler time.²⁵ If it does not aspire to moral improvement, at the very least it prevents moral rot and decay.²⁶ Likewise the scope of federal power should be limited to the expectations of the 1787 Constitution. That might prevent a great deal of democratic lawmaking at the federal level—indeed, it would render unconstitutional most of the modern administrative and welfare state and much federal civil rights protection. But at least it preserves state and local exercises of democracy and it preserves the sort of freedom that the Framers understood and expected.

These two examples suggest why nobody really adheres to skyscraper originalism, at least in its most stringent form. Most originalists today think that there has to be considerable room for development of constitutional powers and rights over time. Sometimes they do it through the backdoor by arguing, as Justice Scalia does, that nonoriginalist precedents are a pragmatic exception to commitment to original meaning.²⁷ Thus, we accept the New Deal settlement and the vast array of federal regulatory powers to regulate health, safety, the economy, the environment, and civil rights—which are far more extensive than the Framers would have dreamed of—because it is simply too late to go back now and people have come to expect that the federal government can exercise these powers.²⁸ This approach

²⁵ SCALIA, *Response, in A MATTER OF INTERPRETATION*, *supra* note 24, at 129, 145 (arguing that we should look to the original expected application of the Cruel and Unusual Punishments Clause because we need protection against “the moral perceptions of a future, more brutal generation”).

²⁶ SCALIA, *Common-Law Courts in a Civil-Law System*, *supra* note 24, at 40–41.

²⁷ Scalia, *Response*, *supra* note 24, at 140.

²⁸ See *Gonzales v. Raich*, 545 U.S. 1, 17 (2005) (Scalia, J., concurring); *Nomination of Judge Robert H. Bork: Hearings before the Senate Committee on the Judiciary*, 100th Cong. 112–13, 264–65, 292–93, 465 (1987), reprinted in 14 *THE SUPREME COURT OF THE UNITED STATES: HEARINGS AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS OF SUPREME COURT JUSTICES BY THE SENATE JUDICIARY COMMITTEE 1916–1987*, at 292–93, 444–45, 472–73, 645 (Roy M. Mersky & J. Myron Jacobstein eds., 1989) (testimony of Robert H. Bork, Sept. 15, 1987–Sept. 19, 1987); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 861–64 (1989); Philip Lacovara, *A Talk with Judge Robert H. Bork*, DISTRICT LAW., May/June 1985, at 29, 32; cf. John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. L. REV. 803, 836–37 (2009) (offering a consequentialist analysis for determining when nonoriginalist precedents should be retained).

views the state-building of the past century as a mistake that we must retain out of a combination of reliance and inertia. But if it is an exception, it is an exception that threatens to swallow the rule of fidelity to original meaning, at least if we construe original meaning in this way.

I think it is far better to see state-building during the twentieth century, including both the administrative and welfare state and the civil rights revolution, not as pragmatic exceptions to originalism but as perfectly consistent with it. These are exercises in constitutional construction that have implemented and built out the skeletal system of 1787 and adapted it to contemporary problems of governance. The growth of the modern state fits poorly with skyscraper originalism, which imagines a very different sort of building entirely. It fits well, however, with framework originalism, because the latter assumes that the Constitution was never a completed thing in the first place. It was a plan of government with an initial allocation of powers, rights, and responsibilities that would be built up through collective action and political contestation over time.

It should by now be obvious why framework originalism is consistent with a wide variety of different forms of living constitutionalism, although certainly not with all of them. Framework originalism permits a great deal of contingency in how the Constitution turns out; each of these versions can still be faithful to text and principle. Put another way, framework originalism does not assume that the nature of the Constitution is fully contained in its origins in the way that the structure of an oak is contained in an acorn. It does not assume a determinate path of evolutionary development. Much is left to circumstance and chance, and this nation, like all nations, will face a wide range of unexpected upsets and challenges that will shape and alter its path and its character, sometimes irrevocably.

II. RETHINKING LIVING CONSTITUTIONALISM

A. *Living Constitutionalism as Constitutional Construction*

Just as we need to rethink originalism, we also need to rethink the idea of a living constitution. People often speak of living constitutionalism as a theory of interpretation, but what we call constitutional “interpretation” actually involves more than one activity. One type of activity, which we might call interpretation proper, is the ascertainment of meaning. Another, which constitutes a far larger task, is constitutional construction—implementing and applying the Constitution in practice, and building out institutions to perform constitutional functions.²⁹ Living constitutionalism

²⁹ On the idea of constitutional construction, see KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* 5 (1999) [hereinafter WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION*]. See also KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* (1999) [hereinafter WHITTINGTON, *CONSTITUTIONAL INTERPRETATION*]. Whittington defines constitu-

is less a theory of interpretation-as-ascertainment than a theory about interpretation-as-construction. Ascertaining meaning is a key element of interpretation, but it is often not enough to make the Constitution workable. Clauses may still be vague or the Constitution may be silent. We must still create doctrines and laws to concretize principles and decide cases, and we must build institutions to make the constitutional system work in practice. For this we must turn to constitutional construction.

We need construction in two situations. The first is when the terms of the Constitution are vague or silent on a question and to apply them we must develop doctrines or pass laws to make its words concrete or fill in gaps.³⁰ The second is when we need to create laws or build institutions to fulfill constitutional purposes.³¹ Both of these practices are the work of living constitutionalism.

Framework originalism requires that we interpret the Constitution according to its original meaning. Living constitutionalism concerns the process of constitutional construction. Framework originalism leaves space for future generations to build out and construct the Constitution-in-practice. Living constitutionalism occupies this space. It explains and justifies the process of building on and building out. That is how the two ideas are related, and why they do not conflict but in fact are inextricably connected.

Put this way, you might think that the original meaning and constitutional construction do not overlap at all. One simply builds on where the other leaves off. But it is not so in practice. Because constitutional construction occurs in the same political space and time as the amendment process, the two processes can sometimes substitute for each other. Vague

tional interpretation as the “process of discovering the meaning of the constitutional text,” while constitutional construction is “essentially creative, though the foundations for the ultimate structure are taken as given. The text is not discarded but brought into being.” *Id.* at 5.

In Whittington’s model, all branches may engage in constitutional interpretation, but constitutional construction is reserved only for the political branches. *Id.* at 9, 11–12, 221 n.3. In contrast, Randy Barnett and I have argued that all branches may engage in constitutional construction. See RANDY BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 118–27 (2004); Balkin, *Abortion and Original Meaning*, *supra* note 3, at 293–94, 300–307; Balkin, *Constitutional Redemption*, *supra* note 3, at 435, 470–71, 476–81.

³⁰ See RICHARD H. FALLON, JR., *IMPLEMENTING THE CONSTITUTION* 5–12 (2001) (arguing that much of the Judiciary’s work involves creating doctrines and tests to give meaning to constitutional values); Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1276, 1317–18 (2006) (noting the existence of gaps between constitutional meaning and judicially enforceable rights that must be filled in through doctrinal implementation).

³¹ See Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1742 (2007) (noting the importance of “landmark statutes that express [a constitutional] new regime’s basic principles”); William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1215–16 (2001) (offering an account of durable “superstatutes” that “seek[] to establish a new normative or institutional framework for state policy” and have “broad effect[s] on the law”); Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408, 411–13 (2007) (“[M]uch of the law that constitutes our government and establishes our rights derives from legal materials outside the Constitution itself.”).

clauses can be built out through doctrine and institution-building in ways that might also be achieved through amendment. (The same is also true with various silences and gaps in the original Constitution.) This is not a bug in our constitutional system; it is a feature. Nevertheless, the processes of amendment and construction are not identical, and what each can achieve in practice does not always overlap.

Some kinds of changes—like the abolition of the Electoral College or altering the length of the President’s term of office—cannot easily be achieved through construction; they require amendment. Constructions may be less durable than amendments: interbranch understandings can be altered through practice, statutes can be repealed and doctrinal constructions overturned, distinguished, or made irrelevant. Conversely, amendment may be an awkward and cumbersome way to respond to certain problems, revise previous doctrinal constructions, create new rules, or promote wholesale changes in government. Constructing doctrine gradually through caselaw development and creating framework statutes and new institutions may be a more nimble and effective method.

Today people generally associate “living constitutionalism” with judicial decisions; but the political branches actually produce most living constitutionalism. Most of what courts do in constitutional development responds to these political constitutional constructions. Courts largely rationalize, legitimate, and supplement what the political branches do, creating new doctrines along the way.³²

The very concept of a “living” Constitution arose in the early twentieth century due to innovations by Congress and by state and local governments in constructing early versions of the regulatory state.³³ At first, federal courts resisted these changes, but eventually rationalized and legitimated them in a series of landmark decisions that are now foundational to modern constitutional law.³⁴ But such judicial decisions are only the tip of the iceberg. We should understand these changes—and living constitutionalism itself—both as a series of doctrines and as a set of new laws and institutions that the doctrines upheld. Living constitutionalism in the New Deal re-

³² Cf. Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 294 (1957) (arguing that the “main task of the Court is to confer legitimacy on the fundamental policies of the successful coalition”).

³³ Howard Gillman, *The Collapse of Constitutional Originalism and the Rise of the Notion of the “Living Constitution” in the Course of American State-Building*, 11 STUD. AM. POL. DEV. 191 (1997).

³⁴ See, e.g., *Wickard v. Filburn*, 317 U.S. 111 (1942) (upholding regulation of wholly intrastate, noncommercial activity if such activity, viewed in the aggregate, would have a substantial effect on interstate commerce); *United States v. Darby*, 312 U.S. 100 (1941) (holding that Congress can regulate employment in manufacturing under the Commerce Clause); *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937) (upholding the unemployment compensation provisions of the Social Security Act of 1935); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (upholding the National Labor Relations Act).

quired adjusting older constitutional doctrines to explain and justify these changes in how governments governed.³⁵

Landmark precedents like the New Deal decisions became durable precisely because so much of the developing structure of governance depended on their construction of the Constitution. This is the central insight of living constitutionalism: state-building by the political branches and judicial constructions are, generally speaking, mutually productive and mutually supportive. To use the metaphor of the living constitution, they grow up together. That is why the New Deal precedents are durable. We have not built upon them because we think they are correct; we think they are correct because we have built so much upon them.

The example of the New Deal is hardly exceptional. Living constitutionalism is usually as much the product of the political branches (including administrative agencies and state and local governments) and changing social and cultural practices as it is the product of federal judicial decisions. Social and political movements express values and press for change both in culture and in politics. The political branches create new laws and institutions, and courts make sense of these constructions. Courts also ratify changes in social mores and institutional practices, some of which are already reflected in new laws and institutions, or in the abolition and reform of older ones. The sexual revolution and the movement for women's liberation are two obvious examples of how constitutional change is prefigured by changes in civil society. Courts can usually do little to block widespread cultural change. Courts may slow down drastic political change in the short run, especially if their members were appointed by different parties or in different regimes; but generally they rationalize and authorize these changes over time. The political branches, in turn, continue to build out the state based on the justifications offered by the Judiciary.

The New Deal Court legitimated the creation of the administrative and welfare state, particularly after Franklin Roosevelt was able to appoint new Justices. It did so by reinterpreting and expanding federal and state power to regulate the economy and engage in redistributive programs, and by creating new procedures to rationalize the expansion of administrative agencies. The members of the Warren Court were largely in sync with the bipartisan liberal coalition that emerged in the 1960s. It upheld new federal laws that prohibited local discrimination, supervised state voting practices,

³⁵ In his model of constitutional change, Bruce Ackerman originally treated the key Supreme Court decisions of the New Deal as "amendment analogues" which amended the Constitution outside of Article V. 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991). In his more recent work, he has come to see constitutional amendments arising out of an interaction between what he calls "superprecedents" and "landmark statutes" like the National Labor Relations Act and the Social Security Act. See Bruce Ackerman & Jennifer Nou, *Canonizing the Civil Rights Revolution: The People and the Poll Tax*, 103 NW. U. L. REV. 63, 65, 67-69, 83, 86-88, 108-109, 124 (2009); Ackerman, *supra* note 31, at 1750-53. My view is that these achievements of twentieth-century constitutionalism are constitutional constructions, not constitutional amendments.

and brought regional majorities (especially in the South) in line with the dominant liberal values of national politics in the 1960s.³⁶ After the political mood of the country changed, the Rehnquist Court cooperated with the ascendant conservative movement, promoting state regulatory autonomy and making it easier for government to support majority religions.³⁷

When courts exercise judicial review to strike down laws, they often work in cooperation with the dominant national political coalition. They impose its values on regional and local majorities; and they strike down statutes passed by older regimes that are inconsistent with the current coalition's values.³⁸ When most states have adopted a social policy, courts tend to ratify these dominant values in new constitutional constructions. Thus, the Court decided *Brown v. Board of Education*³⁹ only after most states had already ended de jure racial segregation in public schools.⁴⁰ *Lawrence v.*

³⁶ See LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 214–15, 490–94 (2000) [hereinafter POWE, *THE WARREN COURT*]; Jack M. Balkin, *What Brown Teaches Us About Constitutional Theory*, 90 VA. L. REV. 1537, 1538–46 (2004); Lucas A. Powe, Jr., *The Politics Of American Judicial Review: Reflections on the Marshall, Warren, and Rehnquist Courts*, 38 WAKE FOREST L. REV. 697, 719–20 (2003). As Keith Whittington notes, the Warren Court's legislative reapportionment decisions were welcomed by liberals who believed that as cities grew larger, legislative malapportionment favored more conservative rural voters over more liberal urban voters. KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY* 127 (2007).

³⁷ See cases cited *infra* notes 68, 69; see also *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (Eleventh Amendment barred damage suits against states for violations of the Americans with Disabilities Act); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (Eleventh Amendment barred damage suits against states for violations of Age Discrimination in Employment Act); *United States v. Morrison*, 529 U.S. 598 (2000) (striking down a section of the Violence Against Women Act as beyond Congress's powers under the Commerce Clause and Section Five of the Fourteenth Amendment); *Alden v. Maine*, 527 U.S. 706 (1999) (expanding state sovereign immunity from damage suits under the Tenth Amendment); *Printz v. United States*, 521 U.S. 898 (1997) (holding that, under the Tenth Amendment, the federal government may not compel state executive officials to administer a federal regulatory program); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996) (Eleventh Amendment immunity applies to legislation passed under Congress's Commerce Power); *United States v. Lopez*, 514 U.S. 549 (1995) (striking down ban on guns near public schools as beyond Congress's powers under the Commerce Clause); *New York v. United States*, 505 U.S. 144 (1992) (holding that, under the Tenth Amendment, the federal government may not compel state legislatures to enact a regulatory program).

³⁸ See WHITTINGTON, *supra* note 36, at 105–20 (showing the different ways that the Supreme Court enforces the values of the existing regime); see also Balkin, *supra* note 36, at 1538–46 (explaining how the Court enforces the dominant coalition's values against outliers); Dahl, *supra* note 32, at 293 (arguing that the Supreme Court is more likely to invalidate old statutes that no longer reflected the preferences of then-current majorities); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 16–18 (1996) (same). For accounts of how judicial decisionmaking responds to national popular opinion, see BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: THE SUPREME COURT AND CONSTITUTIONAL MEANING* (forthcoming 2009) [hereinafter FRIEDMAN, *THE WILL OF THE PEOPLE*]; TERRI JENNINGS PERETTI, *IN DEFENSE OF A POLITICAL COURT* 80–132 (1999); Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2601–13 (2003).

³⁹ 347 U.S. 483 (1954).

⁴⁰ See Balkin, *supra* note 36, at 1539–40. See generally MICHAEL KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 173–96 (2004) (describing broader changes in legal understandings concerning race following World War II).

*Texas*⁴¹ protected the rights of homosexuals under the Due Process Clause only after the vast majority of states had decriminalized sodomy and new attitudes about homosexuality had swept the country.⁴²

Just as courts cooperate with the dominant national coalition, national politicians have regularly buttressed and supported the institution of judicial review and the Judiciary's work of constitutional construction. Keith Whittington points out that only a small number of Presidents have openly resisted the Supreme Court's ability to interpret the Constitution,⁴³ and these arguments generally cease as soon as these Presidents have placed like-minded jurists on the bench.⁴⁴ Most Presidents have actively supported judicial review, or at least have seen it as a better choice than the alternatives. In fact, Presidents have regularly delegated constitutional constructions and even substantial amounts of policymaking to the courts.⁴⁵

Although Presidents routinely assert their right to interpret the Constitution in the normal exercise of their powers, they hardly ever compete with the courts for final authority over the Constitution's meaning except in rare historical circumstances: This occurs when a new President like Thomas Jefferson or Franklin Roosevelt seeks to repudiate a previous and discredited constitutional regime and faces a Judiciary controlled by adherents of the old order.⁴⁶ The attack on judicial authority, however, is only temporary. As soon as the President can stock the Judiciary with ideological allies, presidential challenges to the courts generally cease because the courts generally support and legitimate what the President is doing.⁴⁷ As a result, Whittington explains, "Presidents and political leaders have generally preferred that the Court take the responsibility for securing constitutional fidelity."⁴⁸

When Presidents like Harry Truman or Martin Van Buren are affiliated with the existing constitutional regime of their predecessors (Franklin Roosevelt, Andrew Jackson) and try to further its goals, they usually face a court already stocked with political allies. Hence they generally support the federal courts' powers of judicial review and constitutional construction. In fact, courts generally help presidents enforce the regime's constitutional

⁴¹ 539 U.S. 558 (2003).

⁴² WILLIAM N. ESKRIDGE, *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 130, 139, 168, app. B2 (1999); Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431, 443-45 (2005).

⁴³ WHITTINGTON, *supra* note 36, at 23.

⁴⁴ Mark A. Graber, *The Countermajoritarian Difficulty: From Courts to Congress to Constitutional Order*, 4 ANN. REV. LAW SOC. SCI. 361, 366-67 (2008).

⁴⁵ WHITTINGTON, *supra* note 36, at 21-27, 82-160, 287-92.

⁴⁶ *Id.* at 22-23.

⁴⁷ Graber, *supra* note 44, at 366-67.

⁴⁸ WHITTINGTON, *supra* note 36, at xi.

values against political outliers and local and regional majorities.⁴⁹ Lyndon Johnson strongly supported the Warren Court for precisely this reason.

Finally, when Presidents (like Bill Clinton, Richard Nixon, or Grover Cleveland) face a hostile political environment and/or a Congress controlled by the other party, they usually find that it is better to ally themselves with the power of the courts to restrain Congress and protect their prerogatives than to try to challenge two different branches at the same time. In difficult political environments “the law and the judiciary may be the best defense that a president has.”⁵⁰

As Mark Graber puts it succinctly, “[a]n institution that routinely promotes presidential ambitions is no more countermajoritarian than the presidency” itself.⁵¹ And even during the rare moments when the President attacks judicial authority, important parts of the national political coalition, including members of Congress, often support the courts against the President, because they prefer judicial construction to complete presidential control over constitutional meaning.⁵²

Courts, however, do not merely reflect the views of political elites. They are active participants in the national political coalition of their era. For example, they may tilt toward one wing of the coalition (usually the Presidency) in favor of another. Perhaps more importantly, faced with rapid changes in basic assumptions or governing practices, courts generally act as conservators of past constitutional values: they slow down and temporize change until ascendant forces have shown sustained support over time. Then, partly as a result of changed political circumstances and partly as a result of new judicial appointments, courts make sense of and rationalize the new regime, working out the details in new constitutional doctrines. As noted previously, they bring stragglers and outliers—usually local and regional majorities—in line with the constitutional views of the newly dominant national political coalition. In this way, the federal judicial system as a whole acts as an enforcer of national values in a federal republic. The doctrines that federal courts create, in turn, affect future political practice both in the states and at the national level: They shape political agendas and assumptions about what is politically legitimate and politically possible that later political mobilizations build on, develop, or react to.

These institutional features significantly constrain the direction of judicial construction. That is why, in practice, living constitutionalism does not give judges unfettered discretion. It is not because legal materials prevent innovation, for the history of American constitutional law demonstrates

⁴⁹ *Id.* at 105, 117.

⁵⁰ *Id.* at 166–67.

⁵¹ Graber, *supra* note 44, at 367.

⁵² *See id.* at 368 (“At the very least, a majority in at least one elected branch of the national government has historically thought government by judiciary more attractive politically than presidential authority to determine constitutional meanings.”).

that, over long periods of time, they can be quite flexible. Rather, it is because institutional and structural elements in the political system tend to hem in judicial constructions. These constraints include professional legal culture—which demands coherent professional reasoning from case to case—the symbiotic relationship between courts and the political branches, and above all control of the appointments process by the President and Senate.⁵³ These factors tend to guarantee that judicial innovations are likely to occur only within certain boundaries. That is why the process of judicial construction of doctrine is constrained despite the Constitution's vague clauses and ambiguous silences. The Constitution's open-ended language may seem indeterminate, but at any point in time it is a constrained indeterminacy.

In sum, living constitutionalism is primarily a theory about the processes of constitutional development produced by the interaction of the courts with the political branches. It is a descriptive and normative theory of the processes of constitutional construction. It explains how change occurs and it gives an account of why that process is democratically legitimate, or at least more legitimate than the alternatives. To understand living constitutionalism, therefore, we need to understand constitutional construction. And we must begin not with courts—which usually react and respond—but with constitutional constructions by the people's elected representatives.

B. Varieties of Constitutional Construction

Political actors engage in constitutional construction when they elaborate and enforce constitutional values by creating new institutions, laws, and governing practices. Constitutional construction by political actors overlaps with the ordinary processes of policy and lawmaking, and it may be futile to try to separate them out in every case.⁵⁴ A particular piece of legislation may simultaneously promote the political agenda of a party and implement constitutional values; a new institution may simultaneously promote policy goals and flesh out constitutional structures.

For example, the creation of the various parts of the Executive Branch to carry out programs and administer laws is a constitutional construction; so too is the creation of the Office of the Attorney General⁵⁵ (and later the

⁵³ Sanford Levinson and I have advanced a theory of “partisan entrenchment” in the Judiciary as a key factor in explaining constitutional change. See Jack M. Balkin & Sanford Levinson, *The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 *FORDHAM L. REV.* 489, 490–506 (2006) [hereinafter Balkin & Levinson, *Constitutional Change*]; Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 *VA. L. REV.* 1045, 1066–83 (2001).

⁵⁴ See WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION*, *supra* note 29, at 5–6, 107–12.

⁵⁵ See Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 92–93 (codified as amended at 28 U.S.C. § 503 (1994)) (creating the office of the Attorney General). Congress did not provide the Attorney General with a clerk until 1818. See Act of April 20, 1818, ch. 87, § 6, 3 Stat. 445, 447.

Department of Justice) to advise the President on legal matters and to defend the government in court.⁵⁶ The construction of the National Security State in the late 1940s and early 1950s involved the reorganization of the armed forces, the creation of the Department of Defense, the National Security Council, the Central Intelligence Agency and other institutions for surveillance and intelligence gathering,⁵⁷ a permanent standing army, and the dispersal of American troops throughout the globe. These innovations had constitutional overtones: they changed expectations about how and when Congress and the President would use military force and exert influence overseas.

Political actors also engage in constitutional construction when their decisions and actions create precedents for constitutionally permissible activities, like the Louisiana Purchase, the First and Second Banks of the United States, or the creation of the Federal Reserve System. Political actors can also create precedents about what is not constitutionally permitted, like understandings about when filibusters may be used, when laws or budget appropriations may be kept secret, or the proper grounds for impeachment.⁵⁸ Some of the most important constitutional constructions create precedents by articulating constitutional values in new legislation or new institutions, like Congress's passage of New Deal legislation, its creation of a national bank, or independent federal agencies. Each of these reinterpreted the scope and reach of federal powers.

Political actors also engage in constitutional construction when they create or modify constitutional norms and understandings. Examples include whether it is permissible for the President to veto legislation based on policy disagreement or only constitutional objections, what practical standards Congress will use for impeachments, and how much deference Congress should give to cabinet and judicial nominations. Sometimes constitutional construction involves filling in constitutional silences through constitutional practice, like the decision to adopt first-past-the-post voting systems, or secret ballots.

Some constitutional construction involves forging compromises between different parts of the federal government—or between the states and the federal government—about their respective duties, obligations, and prerogatives. These compromises may lead to new understandings about federalism and the separation of powers.⁵⁹ As different parts of the

⁵⁶ Act of June 22, 1870, ch. 150, 16 Stat. 162 (codified as amended at 28 U.S.C. §§ 501, 503, 509 note (1994)). This Act also created the office of the Solicitor General. *Id.* at § 2.

⁵⁷ National Security Act of 1947, Pub. L. No. 253, ch. 343, 61 Stat. 495 (codified as amended in scattered sections of 50 U.S.C.) (reorganizing the military and intelligence services and creating the Department of Defense, the National Security Council, and the Central Intelligence Agency).

⁵⁸ See WHITTINGTON, CONSTITUTIONAL CONSTRUCTION, *supra* note 29, at 65–71 (discussing constructions arising from the failed impeachment of Supreme Court Justice Samuel Chase).

⁵⁹ See BRUCE ACKERMAN & DAVID GOLOVE, IS NAFTA CONSTITUTIONAL? (1995) (describing the rise of the use of congressional-executive agreements); WHITTINGTON, CONSTITUTIONAL

government struggle with each other, push back at each other, and develop new expectations, they construct new constitutional norms or modify old ones. Examples might include the multiple compromises about protective tariffs during the antebellum era, the admission of states to the union, and the regulation of slavery in the territories. More recent examples are the President's increasing authority to initiate legislation and control the budgeting process, the creation of a vast range of classified intelligence activities with secret budgets to pay for them and secret regulations to govern them, and the change in relative authority between Congress and the President in the conduct of foreign affairs and the use of military force.

The political branches build out the Constitution through everyday politics—passing legislation, issuing regulations, striking political deals. In addition, constitutional culture and constitutional understandings evolve through arguments and mobilizations occurring in ordinary politics. This means that in practice it is useless to try to draw clear boundaries between activities that in hindsight we would label constitutional construction and ordinary political activity. Potentially almost all political and governmental activity could be constitutional construction. Often we may only know what counts later on when institutions become settled and practices and precedents become established. The very notion of constitutional construction involves an interpretive understanding of previous political activity as helping to build out the Constitution and its related institutions.

For example, Congress engages in construction when it passes laws that interpret the Constitution. However, every Congressional enactment passed under the commerce power, and every appropriation under the General Welfare Clause, involves an implicit interpretation of these clauses, whether or not any court ever considers them. Every appointment of an inferior officer, indeed, even the purchase of a new stapler in a regional office of the Social Security Administration presumes the political power to act. Should we regard all of these activities as constitutional constructions? As an interpretive matter, we would not, if the legality of these practices seems clearly established. The purchase of the stapler presumes constitutional power to act, but the activity now seems routine as opposed to a practice of institution-building.

Nevertheless, the continuous repetition of actions and tasks believed to be uncontroversially authorized (and self-conscious forbearance from actions generally believed to be unconstitutional) is not unimportant. It helps reproduce expectations about the authority of constitutional constructions and helps make constitutional constructions durable over time. The everyday activities of administrative agencies or the institutions of national security continuously enmesh these constitutional constructions in lived political experience; they reproduce understandings and expectations about their

CONSTRUCTION, *supra* note 29, at 20–71, 113–57, 162–201 (describing controversies over impeachment, budgeting, and national security).

continued existence and their continued authority. Long-lived constitutional constructions—like those involved in the regulatory state or the national security state—are not simply established in a single moment. They are repeatedly performed in practice, and expectations about them are continuously reproduced in constitutional culture, confirming and reinforcing their durable character.

It follows that even minuscule tasks and quotidian legislation could in theory contribute to constitutional construction if they help forge new understandings of the relative powers of the different branches or of the federal and state governments under the Constitution. The President's power, for example, has sometimes increased by slow accretion over two centuries. Expectations about what Presidents and their Administrations can do (and must do) have expanded through a series of acts great and small, some of which were actively challenged but most of which were not. In hindsight, we might see the collection of these activities as part of a long-term process of constitutional construction of the Executive Branch.

In like fashion, the everyday micropractices of race relations, gender roles, and sexuality in civil society cumulatively may change the public's attitudes about the cultural meaning of equality; in turn, this may reshape the American people's understandings of equal protection and constitutionally protected liberty. In hindsight, these practices may form part of—or significantly influence—a long-term practice of constitutional construction.

In sum, it is best not to worry too much about where constitutional construction leaves off and merely ordinary politics begins. The key point, rather, is to recognize how practices within the constitutional scheme can subtly adjust the scheme itself in addition to the formal processes of constitutional amendment.

C. The Role of Courts in Constitutional Construction

Courts also build institutions through creating the Judiciary's administrative structure, and through developing rules of standing, justiciability, evidence, and procedure.⁶⁰ But perhaps the most important role of federal courts in the system of constitutional construction is legitimating and rationalizing the work of the national political process and its constitutional constructions. Federal courts are part of the national political process, and they are players in the dominant national coalition of their time. Generally speaking, living constitutionalism by courts is a process of doctrinal construction that rationalizes and supplements constitutional constructions by the political branches and responds to changes in political and cultural values in the nation as a whole. Although courts sometimes push back at what

⁶⁰ See PAUL FRYMER, *BLACK AND BLUE: AFRICAN AMERICANS, THE LABOR MOVEMENT, AND THE DECLINE OF THE DEMOCRATIC PARTY* 70–97 (2008) (describing twentieth-century creation of the “Legal State,” which enforces rights through building up judicial procedures and remedies).

Congress and the President do, their constitutional constructions are usually more cooperative than competitive.

Courts engage in constitutional construction in several different ways. First, courts rationalize new constitutional constructions by the political branches through creating new doctrines. Rationalization has a dual meaning. On the one hand, it means providing reasons why the constructions are faithful to the Constitution; on the other, it means subjecting these constructions to reasons—articulating rules and principles of judgment—that will presumably be binding on the political branches in the future. Rationalization is thus both a form of legitimation and a form of policing. Courts express and articulate the constitutional norms and values of the dominant national coalition in constitutional doctrine and thereby help justify them. They re-describe political values in terms of legal rules and principles that will apply to future cases. They synthesize new values and institutions with the past by reinterpreting the past constitutional commitments of previous generations, showing how what the political branches are doing is actually faithful both to the Constitution and to the past. To do this, courts may describe past commitments in new ways or at a higher level of generality, often drawing on the entire history of readings of the Constitution by political and judicial actors.

In giving reasons and synthesizing present with past, courts also set boundaries on what the political branches can do. Thus, the process of rationalization is Janus-faced. It justifies constitutional construction by the political branches, but that justification comes with a price: The courts require the political branches to act within a set of principles, rules, and reasons that courts construct in order to maintain their legitimacy and the legitimacy of the political system.

Many of the most important decisions of the federal courts rationalize constructions by the political branches in precisely this way: They make sense of them and legitimate them while subjecting them to legal authority created by courts, which, in turn, legitimates these actions and similar actions politicians may take in the future. Thus, following the New Deal the Supreme Court responded to the passage of the Social Security Act, the Fair Labor Standards Act, and other legislation by upholding these new assertions of federal power. It legitimated the emerging regulatory and welfare state that had already been created in politics, and gave doctrinal explanations for how new legislation could also pass constitutional muster.⁶¹ The

⁶¹ See, e.g., *United States v. Darby* 312 U.S. 100, 119–20 (1941) (Congress may regulate activities which have a substantial impact on interstate commerce); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938) (legislation will be upheld under the Due Process Clause if it has a rational basis); *Steward Mach. Co. v. Davis*, 301 U.S. 548, 589–92 (1937) (use of federal funds to induce state participation in unemployment compensation scheme did not violate the Tenth Amendment where it did not unduly coerce states to participate and states were free to end participation).

Administrative Procedure Act,⁶² in turn, helped articulate the values of due process and the relationship of Article III courts to the explosion of federal administrative agencies. During the civil rights revolution the Court upheld new civil rights statutes, once again explaining why Congress's actions were permissible and establishing how future civil rights laws would be judged. Many of the landmark decisions of American constitutional history, from *McCulloch v. Maryland*⁶³ to *Katzenbach v. Morgan*,⁶⁴ have this dual character. Over time, courts work out the logical consequences of the value commitments of the new regime as well as its landmark precedents and synthesize them with the work of previous regimes, making them appear as coherent as possible.

Second, as noted previously, federal courts cooperate with the dominant forces in national politics by policing and disciplining those who do not share the dominant coalition's values. Much federal judicial review is directed at state and local government officials. Courts take on the task of articulating and applying the values of the dominant national coalition, imposing the values of national majorities on regional or local majorities. These decisions are countermajoritarian only from a local or regional perspective.

Brown v. Board of Education and *Lawrence v. Texas* are two examples. *Brown* required Southern majorities to accept the constitutional values of the dominant North; *Lawrence* required the remaining thirteen states to decriminalize same-sex sodomy. The Supreme Court often looks to the direction of change in state practices to determine the meaning of vague clauses like the Eighth Amendment's Cruel and Unusual Punishments Clause. Not surprisingly, disputes in these cases often turn on whether the Court has adequately recognized a genuine trend, and whether the trend marks a truly enduring constitutional value or merely reflects a temporary and revisable policy preference.⁶⁵

Along the same lines, courts apply vague clauses and fill in gaps and silences in the Constitution in response to long term changes in social attitudes that have become reflected in national politics. During the sexual revolution, for example, the federal courts promoted liberal values by loosening legal restraints on pornography⁶⁶ and by protecting the right of mar-

⁶² Administrative Procedure Act of 1946, Pub. L. No. 404, ch. 324, 60 Stat. 237 (codified as amended at 5 U.S.C. §§ 551–559, 701–06 (1994)).

⁶³ 17 U.S. 316 (1819).

⁶⁴ 384 U.S. 641 (1966).

⁶⁵ See, e.g., *Kennedy v. Louisiana*, 128 S.Ct. 2641 (2008) (holding that a statute that prescribed the death penalty for rape of a child under twelve years of age is unconstitutional); compare *id.* at 2657–58 (concluding that there is a national consensus against the death penalty in these circumstances), with *id.* at 2665–67, 2672–73 (Alito, J., dissenting) (denying the existence of consensus and arguing that the trend might even be in the opposite direction).

⁶⁶ See, e.g., *Erznoznik v. Jacksonville*, 422 U.S. 205 (1975) (declaring facially invalid an ordinance making it a public nuisance and a punishable offense for a drive-in movie theater to exhibit films con-

ried couples and single persons to use contraceptives.⁶⁷ After social and religious conservatives began to dominate American politics in the 1980s, the Supreme Court revised its Establishment Clause doctrines, making it easier for governments to support religious schools and create voucher programs.⁶⁸ It interpreted the Free Speech Clause to allow private religious groups to hold prayer services after hours in public schools and to engage in religious expression on government property.⁶⁹

Third, federal courts cooperate with the national political coalition by limiting or striking down laws that reflect an older coalition's values. The Rehnquist Court's federalism revolution is an example. Following the Republican takeover of Congress in 1995, the Rehnquist Court began to promote state sovereignty and devolution in line with the views of the Congress led by House Speaker Newt Gingrich. It also began to limit or strike down civil rights statutes passed by the previous Democratic-controlled Congress, including parts of the 1994 Violence Against Women Act, which had been passed just before the Republican takeover.⁷⁰ People often point to *Dred Scott v. Sandford*⁷¹ as a rare example of the Supreme Court holding a federal law unconstitutional in the period before the Civil War.⁷² Not surprisingly, it invalidated an older law: The Missouri Compromise of 1820, a statute that reflected an older set of political assumptions about slavery that had been repealed by Congress in the Compromise of 1850.⁷³

taining nudity, when the screen is visible from a public street or place); *Miller v. California*, 413 U.S. 15 (1973) (announcing a three-part test for obscenity); *Stanley v. Georgia*, 394 U.S. 557 (1969) (holding that mere possession of obscene materials cannot be a crime); *Memoirs v. Massachusetts*, 383 U.S. 413 (1966) (holding that a book with literary value was not legally obscene).

⁶⁷ See, e.g., *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (striking down a prohibition of distribution of contraceptives to minors); *Eisenstadt v. Baird* 405 U.S. 438 (1972) (holding that the right of reproductive privacy extended to single as well as married persons); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (striking down a state law that prohibited the dispensing or use of birth control devices to or by married couples).

⁶⁸ See *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (upholding voucher scheme for private schools under the Establishment Clause); *Mitchell v. Helms*, 530 U.S. 793 (2000) (plurality opinion) (upholding direct government aid in materials and equipment to religious schools); *Agostini v. Felton*, 521 U.S. 203 (1997) (holding that a federally funded program providing instruction to disadvantaged children in parochial schools did not violate Establishment Clause); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) (holding that the Establishment Clause did not prevent a school district from furnishing a student with a sign-language interpreter to facilitate his education at a sectarian school).

⁶⁹ See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993).

⁷⁰ See *United States v. Morrison*, 529 U.S. 598 (2000).

⁷¹ 60 U.S. 393 (1857).

⁷² In fact, the practice was more common than generally supposed. See Mark A. Graber, *Naked Land Transfers and American Constitutional Development*, 53 VAND. L. REV. 73, 78, 116–17 (2000).

⁷³ See *Dred Scott*, 60 U.S. at 452.

Fourth, federal courts cooperate with the national political coalition by taking responsibility—and thus the political heat—for decisions that members of the dominant coalition cannot agree on and that would potentially split the coalition.⁷⁴ Decisions on abortion and Internet pornography are recent examples. Moderate and conservative politicians, particularly in the Republican Party, may want to avoid casting votes that would criminalize abortion entirely; *Roe v. Wade*⁷⁵ takes that question off the table. Instead, they are perfectly happy to cast votes limiting abortion funding, late term abortions, or partial-birth abortions, because these policies are popular both with moderates and with conservatives. Some moderate and liberal politicians, particularly in the Democratic Party, may not want to be blamed for opposing the criminalization of Internet pornography, but are happy to have the courts strike such measures down.⁷⁶ In this way, the Court promotes their values while taking legal responsibility for the outcome.

Fifth, the Supreme Court often takes direction about how to construct doctrine from contemporaneous expressions of constitutional values by political majorities. I have already noted the Roosevelt Court's legitimation of the New Deal: The Supreme Court upheld the National Labor Relations Act in 1937;⁷⁷ that same year in *West Coast Hotel v. Parrish*⁷⁸ it applied the values of the New Deal coalition to uphold state minimum wage legislation. During the 1960s, the Warren Court took direction from the national political process to further the civil rights revolution. Bruce Ackerman and Jennifer Nou have pointed out that following the ratification of the Twenty-Fourth Amendment, which banned poll taxes in federal elections, Section 10 of the 1965 Voting Rights Act urged the Attorney General to challenge the constitutionality of poll taxes in state elections.⁷⁹ Taking its cue from

⁷⁴ WHITTINGTON, *supra* note 36, at 134–38; Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35 (1993).

⁷⁵ 410 U.S. 113 (1973).

⁷⁶ See Keith Whittington, “Interpose Your Friendly Hand”: Political Supports for the Exercise of Judicial Review by the United States Supreme Court, 99 AM. POL. SCI. REV. 583, 591 (2005). In order to ensure passage of the 1996 Telecommunications Act, a reform he greatly desired, President Clinton acquiesced to the addition of the Communications Decency Act (CDA), which made it a crime to make available on the Internet indecent material that minors might be able to access. Although both the Justice Department and the Clinton Administration argued that the measure was unconstitutional, President Clinton signed the bill anyway. As one Administration official put it, “No way are you going to get yourself in a position where the President isn’t willing to go as far as a Democratic Senator in restricting child pornography on the Internet in an election year.” *Id.* The bill, however, also provided for expedited judicial review of the CDA, and after a three-judge district court initially struck it down, the Supreme Court declared it unconstitutional in *Reno v. ACLU*, 521 U.S. 844 (1997). This gave President Clinton and certain members of Congress who voted for the bill the best of both worlds; they got credit for getting tough with Internet pornography while letting the Court protect First Amendment values they shared.

⁷⁷ *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

⁷⁸ 300 U.S. 379 (1937).

⁷⁹ Ackerman & Nou, *supra* note 35, at 108–09.

the political branches, the Warren Court held these taxes unconstitutional in *Harper v. Virginia Board of Elections*.⁸⁰

The Supreme Court's sex equality decisions provide an even more powerful example. During the 1960s, Congress passed a series of acts promoting gender equality, including the Equal Pay Act, Title VII of the Civil Rights Act of 1964, and the 1972 Amendments to Title VII, culminating in passage of an Equal Rights Amendment (ERA) sent to the states in 1972. The Supreme Court recited this history in *Frontiero v. Richardson*, offering it as a reason why sex discrimination violated the Equal Protection Clause even before the ERA was ratified.⁸¹ In fact, the Court's development of sex equality doctrine under the Equal Protection Clause made the ERA largely superfluous. Even so, these doctrines followed the judgments of Congress and the President that sex discrimination already violated constitutional values, as well as large-scale changes in public attitudes about sex equality. More recently, after Congress and the President passed a ban on so-called partial birth abortions, the Supreme Court upheld the Partial Birth Abortion Act of 2003, effectively reversing a seven-year-old decision striking down similar laws.⁸² In each of these examples, judicial constructions either ratified or meshed with recent constitutional constructions offered by the President and Congress.

Critics of the federal Judiciary often complain that judges are elites who are influenced by elite values.⁸³ This is certainly true. But it is also true of the political elites who operate the national political process. Both sets of elites respond to changes in national public opinion, but both sets also favor elite values to the extent that they differ from the values of non-elites.⁸⁴ When political elites are liberal, as they were in the mid-1960s, the work of courts will also tend to be more liberal; when political elites are more conservative, as they were in the late twentieth century, the work of courts will tend to shift to the right. Complaints about federal judicial decisions as "elite" and antidemocratic often better express concerns about fed-

⁸⁰ 383 U.S. 663 (1966).

⁸¹ *Frontiero v. Richardson*, 411 U.S. 677, 687–88 (1973) (plurality opinion) ("Congress itself has concluded that classifications based upon sex are inherently invidious, and this conclusion of a coequal branch of Government is not without significance to the question presently under consideration.").

⁸² *Gonzales v. Carhart*, 550 U.S. 124 (2007) (upholding federal Partial-Birth Abortion Act of 2003 and distinguishing *Stenberg v. Carhart*, 530 U.S. 914 (2000) (striking down a state law banning partial birth abortion)).

⁸³ See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 8, 16–18 (1990); cf. John Ferejohn, *Independent Judges, Dependent Judiciary: Explaining Judicial Independence*, 72 S. CAL. L. REV. 353, 369 (1999) ("[H]owever well motivated [judges] may be, they are likely to bring to their work the perceptions of an upper middle class, educated, largely male, and largely white elite.").

⁸⁴ See LARRY M. BARTELS, *UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE* 285–86 (2008) (affluent citizens have disproportionate impact on social policy outcomes, while "the preferences of persons in the bottom third of the income distribution have no apparent impact on the behavior of their elected officials").

eralism—they reflect complaints by representatives of regional majorities (and regional elites) about the contrasting values of the national political coalition. Conversely, although judicial doctrine tends to stay in sync with the views of national political elites, in some cases these political elites are actually less responsive to changes in national public opinion than the federal Judiciary because of the many veto points in the political system. For instance, seniority and voting rules in the Senate prevented federal civil rights legislation for generations despite popular support for reform; *Brown v. Board of Education* responded to changing views about race following World War II in ways that Congress could not until the middle of the 1960s.⁸⁵

D. Constitutional Constructions and Constitutional Revolutions

A similar analysis applies to constitutional revolutions. Lawyers may associate these transformations with famous court decisions, but they generally involve significant cooperation between courts and the national political branches. Twentieth-century constitutional revolutions, like the New Deal revolution of the 1930s or the civil rights revolution of the 1960s, have not primarily been led by the federal Judiciary. Rather, they have mostly been judicial responses to changes in reigning political coalitions and in the values of the dominant regime in American politics. During the early years of the New Deal the Supreme Court mostly resisted changing political and constitutional assumptions, leading President Roosevelt to make increasingly broad and sweeping claims about federal power to regulate the economy. The New Deal “revolution” consisted largely of the Supreme Court’s decision to get behind the emerging political realities and cooperate with the political branches and especially with the President’s program. Although Roosevelt attacked the Court when it disagreed with him, he largely stopped attacking it—and its powers of judicial review—as soon as the Court began to agree with and cooperate with his Administration. Once Roosevelt had stocked the Supreme Court with friends of the New Deal, the Court responded with a series of precedents legitimating and rationalizing the new constitutional regime and constructing a new constitutional common sense about federalism and economic regulation.⁸⁶

The Warren Court, by contrast, needed little prodding to act in concert with the dominant liberal political consensus of the 1960s. By the 1950s

⁸⁵ KLARMAN, *supra* note 40, at 366 (noting that southern filibusters had blocked civil rights legislation between the 1920s and the 1957 Civil Rights Act); Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 93–94 (2000) (“[F]rom the 1920s through the 1950s, the Supreme Court probably was a better gauge of national opinion on race than was a United States Congress in which white supremacist southern Democrats enjoyed disproportionate power because of Senate seniority and filibuster rules.”).

⁸⁶ See cases cited *supra* note 34.

the Supreme Court had been stocked with Justices who were liberal on racial issues, reflecting the dominance of racial liberals in the Presidential wings of both parties.⁸⁷ The Truman Administration had already desegregated the armed forces and pushed for civil rights in 1948, and asked the Justices to overrule *Plessy v. Ferguson*⁸⁸ in 1950.⁸⁹ In 1954 the Court responded in *Brown v. Board of Education*. A regional majority in the South blocked any congressional action on racial segregation, but a national majority favored the result in *Brown*, as did foreign policy elites.⁹⁰ *Brown* was not an example of a Court striking out on its own against the wishes of majorities; it was an example of a Court that sided with key elements of the dominant national political coalition and with national political elites.

In the 1960s a liberal Democratic President, Lyndon Johnson, led a coalition of political liberals and moderates in both parties to enact an ambitious civil rights agenda, passing the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Fair Housing Act of 1968. The Supreme Court strove to uphold the new civil rights legislation from constitutional challenge, expanded Congressional powers to protect civil rights, and struck down state poll taxes after Congress requested it do so in the 1965 Voting Rights Act.⁹¹ The Warren Court's criminal procedure revolution imposed national standards of fairness on state and local law enforcement officials whose practices disproportionately burdened blacks and the poor.⁹² As Congress and the President began a War on Poverty, the Court began constitutionalizing protections for the poor;⁹³ several years after Congress

⁸⁷ See, e.g., KEVIN J. MCMAHON, RECONSIDERING ROOSEVELT ON RACE: HOW THE PRESIDENCY PAVED THE ROAD TO BROWN (2004) (arguing that Franklin Roosevelt deliberately appointed judges deferential to presidential power and receptive to civil rights claims, especially when made by the Executive).

⁸⁸ 163 U.S. 537 (1896).

⁸⁹ KLARMAN, *supra* note 40, at 210. The Justice Department made this request in a trio of cases decided in 1950. See Brief for the United States at 35–49, *Henderson v. United States*, 339 U.S. 816 (1950) (No. 25); Memorandum for the United States as Amicus Curiae at 9–14, *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950) (No. 34); *Sweatt v. Painter*, 339 U.S. 629 (1950).

⁹⁰ Balkin, *supra* note 36, at 1539; KLARMAN, *supra* note 40, at 344–45, 445; see MARY DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY 80–81 (2000); GERALD ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 42 (1991).

⁹¹ *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966); see also Ackerman & Nou, *supra* note 35.

⁹² POWE, THE WARREN COURT, *supra* note 36, at 492 (arguing that the Warren Court's criminal procedure decisions imposed national standards on local and state police officers, prosecutors, and judges); Klarman, *supra* note 38, at 60–66 (connecting the Warren Court's criminal procedure revolution to changing attitudes about poverty); cf. Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361, 1451 (2004) (arguing that Warren Court decisions reflected shifts in national public opinion and changing attitudes about police misconduct, race, poverty, and perceived rates of crime).

⁹³ See *Goldberg v. Kelly*, 397 U.S. 254 (1970) (holding that due process requires a hearing before the termination of welfare benefits); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (striking down, on equal protection grounds, a statute that denied welfare benefits to residents who had not been in the jurisdiction for at least one year); *Harper*, 383 U.S. 663 (striking down poll tax in state elections).

passed a revolutionary new immigration act in 1965, the Court protected resident aliens from discrimination by state governments.⁹⁴

The twentieth century's constitutional revolutions have largely been revolutions in constitutional construction. They have involved alterations in constitutional common sense produced through political mobilization and judicial cooperation. Constitutional revolutions are changes in expectations about what constitutional provisions mean and how they are likely to be applied; changes in what kinds of positions are thought reasonable and unreasonable, "off-the-wall" and "on-the-wall." These changes are prompted by the contemporaneous work of the political branches and by social mobilizations.

Most of what courts do in constitutional construction is normal science, working out the consequences of previous commitments and counter-commitments and reasoning from previous precedents. During periods of significant constitutional change, however, courts face a different task: making sense of new political realities, significant shifts in public sentiment, and new constitutional constructions created by the political branches. Courts play their supporting role by shifting what is "off-the-wall" and "on-the-wall" in constitutional doctrines and expectations about the likely application of constitutional doctrines. They do this in order to make sense of the facts on the ground created in ordinary politics. Key questions of judicial construction concern whether and how to legitimate changes or innovations in statecraft and whether and how to cooperate with parts of the national political coalition, particularly the Presidency. How courts react will depend on their composition: who appointed their members and when they were appointed.

Courts are by nature conserving if not conservative institutions; their composition tends to reflect the political values of the time their various members were appointed. For this reason sometimes courts will resist significant changes in governing assumptions promoted by the President or Congress. They will ally themselves with those parts of the national political coalition that oppose change. The Judiciary acts as a check on the political branches, just as Congress and the President check each other. This checking function occurs not because courts are wiser than the political branches, but because of their institutional configuration: judges are appointed by politicians from the past and they decide cases based on past precedents and prior conventions. Nevertheless, in successful constitutional transformations like the New Deal, advocates of change maintain political power and eventually stock the courts with their allies. At this point, courts begin to cooperate, and they resume their standard function: they legitimate and rationalize new constitutional constructions by the political branches, and they impose norms of procedural regularity and new forms of civil liberties protections to make sense of the new regime's innovations. Courts

⁹⁴ *Graham v. Richardson*, 403 U.S. 365 (1971).

will not uphold everything the national political process does, but they will uphold the major aspects of the new regime's program and articulate its values in judicial decisions. These doctrinal developments cannot be explained solely as the normal or ordinary working out of the details of previous doctrines, particularly when old judges are replaced by newer judges who are more in sync with the dominant national coalition. These new judges reject a significant amount of previous assumptions, remaking constitutional common sense.

To respond to changes in the national political process, courts may have to discard a substantial proportion of existing doctrine. They must create new rights and powers where none existed before, overrule existing decisions, or distinguish them into irrelevance. Courts do this by ascending to the general—by going back to first principles and rearticulating those higher order principles in a new way. In *West Coast Hotel v. Parrish*,⁹⁵ for example, the Supreme Court cast a skeptical eye on an entire generation of due process jurisprudence:

[T]he violation alleged by those attacking minimum wage regulation for women is deprivation of freedom of contract. What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation, the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals, and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.⁹⁶

Here, the Court claims fidelity to basic constitutional principles stated at a high level of generality. Claiming fidelity to principles of higher generality that remain consistent with the text is the easiest way for courts to synthesize revolutionary changes in doctrine with past commitments. Constitutional construction in revolutionary times ascends to the general in order to bless the actual. Appeals to text and principle allow courts to maintain continuity with the past even as their constructions change considerably.

Basic principles often appear differently to later generations than to previous generations that articulated them. The perspective of later generations is likely to be different because they stand in a different relation to the past. And because later generations see different things in the past, they will understand themselves to be faithful to the past differently.

⁹⁵ 300 U.S. 379 (1937).

⁹⁶ *Id.* at 391.

Although constitutional construction by courts involves the articulation, elaboration, and application of constitutional principles, my account of constitutional construction differs from Ronald Dworkin's model of the Court's principled function. Dworkin's model of constructive interpretation tries to make sense of the whole of past judicial decisions, tempered by the best theory of political morality available.⁹⁷ My model argues that courts try to make sense of recent innovations in state-building, redescribing past principles and precedents in the process. The New Deal Court did not try to make sense of the entire history of federalism and due process doctrine; rather, it tried to shape doctrines to fit new forms of statecraft by the political branches.

Moreover, the principles employed in constitutional construction are not limited to those available at the time of adoption. New constitutional principles (e.g., structural principles) can emerge over time as constitutional constructions of the text.⁹⁸ Doctrine consists of a wide variety of different principles at different levels of generality and specificity. New constitutional constructions can be inconsistent with many prior constructions and with a wide variety of principles of varying levels in existing doctrine. For example, during the period from 1934 through 1950, the Supreme Court largely abandoned an elaborate theory of the scope of state police powers that it had developed over a period of seventy years.⁹⁹ Instead, it constructed a new theory of judicial scrutiny for cases involving economic and social legislation.¹⁰⁰

My account of constitutional construction has much in common with Bruce Ackerman's theory of constitutional moments, particularly in light of his recent revision of the theory to account for the civil rights revolution.¹⁰¹ Nevertheless, there are six important differences, which produce a different account both of constitutional revolutions and of living constitutionalism.

First, Ackerman's theory focuses only on the very largest changes in constitutional development that produce new constitutional regimes like Reconstruction or the New Deal. In addition, Ackerman's model of change is not gradual, but revolutionary. Regime changes must occur in a very short space of time, normally within ten years.¹⁰² Thus, Ackerman's model does not purport to explain mid-level or smaller changes within regimes or

⁹⁷ See RONALD DWORKIN, *LAW'S EMPIRE* 52, 166, 227–28, 255, 265, 363–68 (1986).

⁹⁸ See Balkin, *Constitutional Redemption*, *supra* note 3, at 488–93.

⁹⁹ See HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* 10–14, 175–93 (1993).

¹⁰⁰ See *Ferguson v. Skrupa*, 372 U.S. 726 (1963); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

¹⁰¹ Ackerman, *supra* note 31.

¹⁰² Bruce Ackerman, *Revolution on a Human Scale*, 108 *YALE L.J.* 2279, 2287–89 (1999) (proposing a ten-year test for revolutionary change). This compressed time horizon helps ensure that the American people have focused self-consciously on the changes and assented to them.

between great regime shifts except to the extent that he can describe these changes as the working out of the regime's larger commitments or as a synthesis with the commitments of previous regimes.¹⁰³ By contrast, my model assumes that constitutional constructions come in many different sizes, from very great to very small. Moreover, constitutional constructions have no set time limit. Some very important shifts have emerged from modest changes that culminate over time.

Second, Ackerman argues that regime changes are democratically legitimate because they enjoy the self-conscious, mobilized, and broad support of the American people.¹⁰⁴ This means that the American people, or at least, the vast majority of them, must understand that the Constitution is being amended and previous constitutional commitments are being discarded, and they must actively support these changes. By contrast, I argue that the American people do not need to have—and generally do not have—a self-conscious understanding of new constitutional constructions as revolutionary constitutional amendments. Many constitutional constructions go largely unnoticed by the public. Moreover, when members of the public actively support them (which they may not) they tend to understand these changes as restorations or redemptions of constitutional text and principle rather than as displacements or amendments.¹⁰⁵ Even during the height of the controversy over the New Deal, Franklin Roosevelt insisted that his proposals for reform were fully consistent with the constitutional text; he wanted the right to appoint new Justices who would read the Constitution correctly.¹⁰⁶ In any case, much constitutional construction, especially smaller and mid-level changes, occurs without self-conscious mobilization or assent by the American people. Rather, it reflects the passage of new legislation and administrative regulations by the national political coalition, and the Judiciary's adjustment, rationalization, and extension of these efforts.

Third, Ackerman's constitutional moments usually have some tincture of illegality that signals that a revolution is taking place. They involve "un-

¹⁰³ 1 ACKERMAN, *supra* note 35, at 131–62 (1991) (describing intergenerational synthesis and offering *Brown v. Board of Education* and *Griswold v. Connecticut* as examples).

¹⁰⁴ Ackerman, *supra* note 102, at 2283–85 (emphasizing self-consciousness of actors in moments of revolutionary change); see, e.g., 2 ACKERMAN, *supra* note 35, at 358–59 (arguing that ordinary Americans understood the events of the New Deal as a constitutional revolution, confirmed by the consolidating election of 1940); 1 ACKERMAN, *supra* note 35, at 290 (revolutionary agendas must seek "to gain the deep, broad and decisive support of the American people").

¹⁰⁵ See Balkin, *Abortion and Original Meaning*, *supra* note 3, at 301, 309; Balkin, *Constitutional Redemption*, *supra* note 3, at 506–08.

¹⁰⁶ Franklin D. Roosevelt, Address on Constitution Day, Washington, D.C. (Sept. 17, 1937), available at <http://www.presidency.ucsb.edu/ws/?pid=15459> ("You will find no justification in any of the language of the Constitution, for delay in the reforms which the mass of the American people now demand. . . . [N]early every attempt to meet those demands for social and economic betterment has been jeopardized or actually forbidden by those who have sought to read into the Constitution language which the framers refused to write into the Constitution.").

conventional adaptations” of existing constitutional machinery that the people accept or reject.¹⁰⁷ By contrast, constitutional constructions in my model present themselves as perfectly legal articulations of text and principle; at most they discard previous constructions that advocates claim are no longer faithful to the best understandings of text and principle and have otherwise lost connection with changed social and political realities.

Fourth, in order to ensure that regime change enjoys the mobilized support of the American public, Ackerman requires that change must traverse a five-stage process: a signaling event, a proposal, a triggering election, a ratifying election, and consolidation.¹⁰⁸ If change does not correspond to this sequence of events, it is not legitimate. By contrast, I argue that constitutional constructions emerge through many different methods, and there is no necessary sequence they must follow to create valid law.

Fifth, Ackerman’s model has a place for what I call constitutional construction but he explains its democratic legitimacy differently. The commitments of a new regime, he argues, must be worked out over time and synthesized with the commitments of previous regimes. For example, he assumes that the sex equality jurisprudence of the 1970s is not part of the civil rights revolution, which Ackerman believes was centrally about racial equality.¹⁰⁹ Instead, this jurisprudence is a judicial elaboration of the 1960s’ civil rights regime synthesized with the commitments of previous regimes like Reconstruction.¹¹⁰ The democratic legitimacy of these judicial elabora-

¹⁰⁷ 2 ACKERMAN, *supra* note 35, at 9, 22, 82, 120, 154 (discussing the role of unconventional adaptations in higher lawmaking.); *id.* at 187 (unconventional adaptation by political elites allows them to test the assent of the public). Ackerman’s idea of unconventional adaptation better fits constitutional controversies during the Founding, the Jeffersonian revolution, and Reconstruction; in the case of the New Deal, he argues that lawyers’ use of Supreme Court opinions as amendment analogues is an unconventional adaptation, *id.* at 270–71, although it does not fit into his five-part scheme in the same way as in the previous historical examples. These opinions appear at the last stage of consolidation rather than setting up the key moment of popular decision for or against revolutionary change. *See id.* at 187–88. Although Ackerman does not address the point directly, presumably the use of both landmark judicial decisions and landmark statutes as amendment equivalents is the characteristic unconventional adaptation of the civil rights revolution. *See* Ackerman, *supra* note 31, at 1760–61, 1770–71 (arguing that the 1964 Civil Rights Act, like the Fourteenth Amendment during Reconstruction, placed the question of revolutionary change before the public).

¹⁰⁸ 2 ACKERMAN, *supra* note 35, at 20, 26, 359 (discussing the procedural preconditions for legitimate change); *id.* at 166, 207, 211 (noting the signaling act of illegality by the Convention/Congress, resistance by conservative branches, recourse to the people through a triggering election, the unconventional threat of Presidential impeachment, and eventual capitulation in the Reconstruction period); *id.* at 359 (noting the structure of New Deal revolution involving a triggering election, the unconventional threat by President Roosevelt, transformative appointments, a ratifying, consolidating election, and consolidating judicial opinions); Ackerman, *supra* note 31, at 1762 (describing the five-stage process for civil rights revolution); Ackerman, *supra* note 102, at 2298–99 (noting the pattern of signaling, proposing, triggering, and ratifying by the Federalists).

¹⁰⁹ Ackerman, *supra* note 31, at 1741, 1790.

¹¹⁰ Bruce Ackerman, *Interpreting the Women’s Movement*, 94 CAL. L. REV. 1421, 1426 (2006) (“It was the Court’s understanding of the evolving requirements of Equal Protection which shaped its re-

tions derives from the democratic legitimacy of each of the regimes whose commitments judges synthesize. The legitimacy of these decisions does not come from their contemporaneous connection to national public opinion about sex equality or to the values of the dominant national political coalition. By contrast, I argue that the judicial recognition of sex equality in the 1970s emerged from significant changes in popular opinion spurred on by the second wave of American feminism, from the efforts of state legislatures and the political branches of the federal government—who began to put sex equality guarantees into legislation and administrative regulations—and from Congress’s submission of the Equal Rights Amendment to the states in 1972.¹¹¹ The federal courts’ sex equality decisions in the 1970s recognized and rationalized these shifts in constitutional culture; the decisions gained their legitimacy from their connection to changes in constitutional culture and contemporaneous constitutional constructions by the political branches.

Sixth, Ackerman’s model argues that the central artifacts of regime changes, especially in the twentieth century, are landmark decisions and landmark statutes. One of his most controversial claims is that these decision and statutes are full-fledged constitutional amendments.¹¹² They have the same legal status as other constitutional amendments passed through Article V. Moreover, Ackerman argues that courts should reason from their text and principles in the same way that they reason from newly enacted constitutional texts.¹¹³ By contrast, I do not regard either the Social Security Act of 1935 or Title VII of the Civil Rights Act of 1964 as constitutional amendments. They are ordinary legislation which can be amended (and have been amended) or even repealed through the ordinary political process. If Congress does not repeal the Social Security Act or Title VII, it is not because it lacks the formal authority to do so. It is rather because these constructions are durable in practice and it would be politically difficult if not impossible to repeal them in our current political culture.¹¹⁴ Even so, landmark statutes like the National Labor Relations Act, the Voting Rights

sponse to the women’s movement, not the other way around.”); *id.* at 1434 (arguing that the Court worked out implications of commitment of racial equality to gender stereotyping).

¹¹¹ See *supra* text accompanying note 78.

¹¹² 2 ACKERMAN, *supra* note 104, at 270 (describing *Darby* and *Wickard* as “amendment analogues”); Ackerman, *supra* note 31, at 1761 (“I will be presenting the landmark statutes of the 1960s as functionally equivalent to the constitutional amendments of the 1860s.”); *id.* at 1788 (“The legal landmarks emerging from this moment of popular sovereignty should not be denigrated merely because they took the form of statutes rather than formal amendments.”).

¹¹³ Ackerman, *supra* note 31, at 1753–54 & n.38.

¹¹⁴ Ackerman does not disagree. See *id.* at 1788–89. However, he characterizes the issue differently: he argues that “an all-out assault on the Civil Rights Act, or the Voting Rights Act, could not occur without a massive effort comparable to the political exertions that created these landmarks in the first place.” *Id.* at 1788. Since these landmark statutes are constitutional amendments outside of Article V, it would seem to follow from his reasoning that the same five-stage process would be required *legitimately* to repeal these statutes. This is not my view.

Act, and the Civil Rights Act of 1964 have been repeatedly altered through ordinary legislation throughout their history, and these legislative amendments are not unconstitutional, even if they are unwise or inconsistent with the spirit of the original enactments.

In like fashion, key doctrines created by courts are not amendments to the Constitution, as Ackerman contends, but constitutional constructions that can be limited, distinguished, or even overturned by later courts in the same way that any other decisions can be limited, distinguished, or overturned. Landmark decisions like *United States v. Darby* and *Wickard v. Filburn* could, in theory, be significantly limited or jettisoned tomorrow if courts found them unworkable or completely inhospitable to the needs of the national political coalition, but this is unlikely to happen because so much depends on their continuation.¹¹⁵ This is in part what it means to say that they are durable and canonical constructions.¹¹⁶ Perhaps the most famous of all landmark decisions, *Brown v. Board of Education*, has been continuously reinterpreted since it was first handed down, and there is a strong argument that it has been significantly modified, if not wholly transformed, by later decisions.¹¹⁷ This has happened, in part, because courts have reinterpreted and reshaped *Brown* in concert with the shifting values and agendas of successful countermobilizations and the dominant national political coalition.

E. Why Courts Cooperate in Constitutional Construction

Institutional factors explain why courts behave in the way I have described. The Supreme Court is a multimember body whose decisions in close cases tend to be resolved by the median or swing Justices, whose identity (and position at the median), in turn, is produced by successive judicial appointments. In addition, Justices are legal professionals, and professional culture demands that their work remain in the political and

¹¹⁵ Balkin & Levinson, *Constitutional Change*, *supra* note 53, at 510–13 (2006) (explaining why the Rehnquist Court’s federalism revolution did not fundamentally reshape New Deal precedents).

¹¹⁶ See *infra* Part II.F.

¹¹⁷ See Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 28–32 (2003) (explaining how political countermobilizations reshaped antidiscrimination law); Balkin, *supra* note 36, at 1563–68 (explaining how changes in American politics altered *Brown*’s practical meaning); Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1547 (2004) [hereinafter Siegel, *Equality Talk*] (showing how the “anticlassification principle was not the [original] ground of the *Brown* decision, but instead emerged from struggles over the decision’s enforcement”); David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935 (1989) (arguing that 1970s equal protection jurisprudence limited the transformative potential of *Brown*).

cultural mainstream. Lower courts are also staffed by legal professionals and are further hemmed in by the Supreme Court's precedents.¹¹⁸

The distribution of public opinion and professional notions of reasonableness, however, do not remain constant. Social movements, interest groups, and political parties vie with each other to influence popular beliefs about the Constitution. Social and political movements seek to alter what is "off-the-wall" and "on-the-wall" in constitutional culture and eventually in professional legal thought.¹¹⁹ The appointments process also reflects a tug of war between different social and political constituencies. Partisan entrenchment in the Judiciary¹²⁰ combined with changing popular attitudes and shifts in constitutional culture eventually become reflected in judicial decisionmaking using vague texts. Thus, as I describe in more detail later on, the processes of living constitutionalism gradually translate constitutional politics into constitutional law.

These political and cultural influences can push doctrine to the left as well as to the right. Some of the most powerful social movements and political forces in the past forty years have been conservative, and therefore it is no surprise that many constitutional doctrines reflect contemporary conservative ideas. Political conservatives have influenced political culture for the past generation, and have enjoyed sufficient political clout to staff most of the federal Judiciary and a majority of the positions on the Supreme Court. The same basic features of constitutional politics that led courts to recognize the rights of gays in *Lawrence v. Texas* also produced recognition of an individual right to bear arms in *District of Columbia v. Heller*.¹²¹ Indeed, the very same weather vane, the swing Justice, Anthony Kennedy, was the fifth and deciding vote in both decisions.

In short, the Judiciary cooperates with the political branches because of institutional features of democratic politics. Living constitutionalism is a process of argument and persuasion in politics and culture that is eventually reflected in law. If you don't like the living Constitution you get, you

¹¹⁸ For discussions of institutional constraints on judges, see Balkin, *Abortion and Original Meaning*, *supra* note 3, at 310–11; Balkin, *Constitutional Redemption*, *supra* note 3, at 513–16; Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 270–329 (2005).

¹¹⁹ On the concept of a "constitutional culture," see Robert C. Post, *Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 8–11, 53–56 (2003). On the idea of "off-the-wall" and "on-the-wall" constitutional interpretations, and their importance to constitutional theory, see Jack M. Balkin, "Wrong the Day It Was Decided": *Lochner* and Constitutional Historicism, 85 B.U. L. REV. 677, 713, 718–24 (2005) [hereinafter Balkin, "Wrong the Day It Was Decided"]; Jack M. Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure*, 39 SUFFOLK U. L. REV. 27, 28 (2005); Jack M. Balkin, *Respect-Worthy: Frank Michelman and the Legitimate Constitution*, 39 TULSA L. REV. 485, 507–10 (2004) [hereinafter Balkin, *Respect-Worthy*]; Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1444–47 (2001).

¹²⁰ See sources cited *supra* note 53.

¹²¹ 128 S. Ct. 2783 (2008).

should be working harder to get the national politics you like, because that is the engine of constitutional construction.

The system of living constitutionalism does not depend on judges of impeccable character any more than it depends on the good character of legislators and Presidents. Indeed, as critics of the federal Judiciary often remind us, the members of the federal Judiciary may not be wiser or more moral than the political process itself. Even so, the Framers of our Constitution recognized that multiple institutions that compete with and check each other can add to the legitimacy of the political system. Different institutional roles foster different role moralities and perspectives. The clash of these positions restrains all of the participants in the constitutional system. We can best understand the Judiciary not as a special font of wisdom or political morality but as an institution of constitutional development with a distinctive institutional role and professional ethos that competes and cooperates with constitutional development by the other branches. The Judiciary generally cooperates with policies that demonstrate sustained popular support at the national level, but also usually acts as a check on radical constitutional innovation that lacks sustained support. These judicial functions serve the larger goals of constitutionalism and thus contribute to the democratic legitimacy of the political system as a whole, even if particular members of the Judiciary do not possess judgment superior to most members of the national political process.

F. Durability, Canonicity, and the Emergence of New Secondary Rules

Under this model of constitutional construction, many things cannot be changed without constitutional amendment. For example, the “hard-wired” features of the Constitution are fixed; so too are those rules that follow directly from the original meaning of the text. This is the point of framework originalism.

In addition, constitutional constructions—both those created by the political branches and those created by courts—can also become *durable* and *canonical*. Durability means that constitutional constructions—whether in the form of statutes, practices, or decisions—are not easy to change, however easy this might appear as a formal matter. Canonicity means that constitutional constructions are important to legal understanding—and especially professional legal understanding—in the current constitutional culture.¹²² Canonical constructions set the parameters for what is considered reasonable and central, or unreasonable and peripheral in the constitutional culture. They also set agendas for current debates about

¹²² Sanford Levinson and I have distinguished the constitutional canon as understood by citizens from the canon as understood by legal professionals. See J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963 (1998). However, these inevitably overlap and influence each other.

constitutional development. Legal thought is distinctive in that it has both a canon of constructions that are currently valued in constitutional culture and an anti-canon of prior, rejected constructions that legal professionals now regard as characteristic examples of how not to reason about the Constitution.¹²³ *Dred Scott v. Sandford* is a well-known example of an anti-canonical decision.

Constructions become durable in part because they are useful to everyday political life and because successive generations build on them and depend on their continuation. Constitutional constructions become durable because they are embedded in political, economic, and social practices and people continuously build on those practices. Dependence in use not only makes these constructions durable; it also causes people to view them as correct or even obvious interpretations of the Constitution.

Constitutional constructions become canonical because their meaning is salient and important to our political regime. Canonical constructions pose agendas and problems to solve; they symbolize important commitments and values; and therefore people feel the need to rationalize and synthesize their positions with these constructions. Conversely, people feel the need to show why their positions are inconsistent with or repudiate constructions that are anti-canonical in the current regime. Some constitutional constructions can be more canonical—in the sense of being salient and important to current understandings and debates—than parts of the constitutional text. The Social Security Act,¹²⁴ *Brown v. Board of Education*, and even *Roe v. Wade* are more canonical in the present constitutional regime than the Import-Export Clause of Article I.¹²⁵

Many constitutional constructions are both durable and canonical, and these characteristics often reinforce each other. *Brown v. Board of Education* is both durable and canonical. So too are the Civil Rights Act of 1964¹²⁶ and the Social Security Act. They are durable in the sense that people rely on them and build on them. They are canonical in the sense that people see them as articulating important values and commitments.

Constitutional constructions can be durable but not canonical. Many statutes that promote constitutional values are not central to the meaning of the existing constitutional regime, and so too are many precedents embedded in the fabric of the law that nobody pays much attention to. Constructions can be durable but not canonical if they lack cultural meaning or salience. They can become newly salient, of course, if someone challenges them.

¹²³ *Id.* at 1018–19.

¹²⁴ Social Security Act of 1935, ch. 531, Pub. L. No. 74-271, 49 Stat. 620 (codified in scattered sections of 26 U.S.C. and 42 U.S.C. (2006)).

¹²⁵ U.S. CONST. art. I, § 9, cl. 5.

¹²⁶ Pub. L. No. 82-352, 78 Stat. 241 (codified as amended in scattered sections of 28 and 42 U.S.C.).

Conversely, constitutional constructions can be canonical but not durable, if, for example, they are canonical because they are controversial, like *Brown* before 1964 or *Roe v. Wade* today, or if they become part of the anti-canon, like *Lochner v. New York*¹²⁷ or *Dred Scott*. (Although *Dred Scott* has a prominent place in the anti-canon, it is not currently important to everyday political practice.)

Durability does not mean resistance to all alteration. Landmark statutes are often amended, and courts and administrative agencies put many glosses on them. Rather, durability means that people build on a construction, and by building on it, depend on its continuation. Precisely because the construction serves as a building block for future improvements, it may be altered in the process so that it better meshes with the interests, values, and understandings of the existing constitutional regime.

Likewise, canonicity does not require that social meaning remains constant. Quite the contrary: canonical constructions are often protean—they seem to mean new things as they are introduced into new political and legal contexts. For example, the meaning of cases like *Brown*, *Marbury*, *Roe*, or *Lochner* may change greatly over time as a result of political contestation or in the context of successive regimes.¹²⁸

Moreover, a principle associated with a constitutional construction can be durable or canonical, but how the principle would apply to specific applications or facts can change. For example, the principle of *West Coast Hotel v. Parrish* in 1937—deference to legislative judgments in social and economic legislation—is durable. Yet the actual statute upheld in *West Coast Hotel*—a minimum wage law for women but not for men—would no longer be considered ordinary social and economic legislation. It would violate the Equal Protection Clause under the Supreme Court’s 1970s sex equality jurisprudence.¹²⁹

Conversely, certain basic applications of a canonical construction like *Brown* to its original facts might remain constant—*de jure* racial segregation is still illegal—but the construction’s meaning and the principles it stands for can change as people fight over its legacy and invoke it for different purposes. Later generations can also blunt its practical effects in some areas—such as school integration—while expanding it in others, such as limitations on affirmative action plans.¹³⁰

¹²⁷ 198 U.S. 45 (1905).

¹²⁸ See Balkin, “*Wrong the Day It Was Decided*,” *supra* note 119 (noting the changing meanings of *Lochner* in constitutional canon).

¹²⁹ *E.g.*, *Craig v. Boren*, 429 U.S. 190 (1976) (requiring intermediate scrutiny of all sex classifications); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (plurality opinion) (sex classifications are inherently invidious and subject to strict judicial scrutiny); *Reed v. Reed*, 404 U.S. 71 (1971) (statute preferring male over female executors of estates was an arbitrary choice forbidden by the Equal Protection Clause).

¹³⁰ See Balkin & Siegel, *supra* note 117, at 28–32 (2003) (describing the end of the Second Reconstruction and how political struggles changed the practical meaning of the antidiscrimination principle);

How and why do constitutional constructions become durable or canonical? There are four basic reasons:

- (1) Constitutional constructions become durable when people stop fighting about them and accept them in practice.¹³¹
- (2) Constitutional constructions become durable when they become embedded in practice and people build on them. The New Deal cases—*United States v. Darby*,¹³² *Wickard v. Fillburn*,¹³³ and *Steward Machine Company v. Davis*¹³⁴—are durable in this way.
- (3) Constitutional constructions become canonical when people stop fighting over whether to accept them and start fighting over their meaning and legacy. This is what happened to *Brown* and the 1970s sex equality decisions.
- (4) Constitutional constructions become canonical when fights over their meaning become important to resolving constitutional disputes in the present. They set the agenda of constitutional reasoning and debate. This is true of *Roe v. Wade* today. It will likely also be true of *Lawrence v. Texas*, which recognized gay rights, and *District of Columbia v. Heller*, which recognized an individual right to bear arms in the home for purposes of self-defense.

Both durability and canonicity are features of constitutional culture: they concern which practices and understandings become normal, expected, essential, compulsory, or simply go without saying; which issues are salient and which fade into the background of concern. Durable and canonical constructions help shape what kinds of claims are “off-the-wall” and “on-the-wall” at a given time and what legal professionals regard as reasonable and unreasonable positions. One can characterize a constitutional culture like our own in terms of what is durable and what is canonical at a particular time in history.

Balkin, *supra* note 36, at 1563–68; Siegel, *Equality Talk*, *supra* note 117, at 1547 (showing how the “anticlassification principle was not the [original] ground of the *Brown* decision, but instead emerged from struggles over the decision’s enforcement”).

¹³¹ See Mark A. Graber, *Settling the West: The Annexation of Texas, the Louisiana Purchase and Bush v. Gore*, in *THE LOUISIANA PURCHASE AND AMERICAN EXPANSIONISM* 83, 85 (Sanford Levinson & Bartholomew Sparrow eds., 2006) (noting that serious constitutional questions regarding the Louisiana Purchase and the annexation of Texas were settled not by courts, but when opponents of these measures conceded defeat in the political arena).

¹³² 312 U.S. 100 (1941).

¹³³ 317 U.S. 111 (1942).

¹³⁴ 301 U.S. 548 (1937) (upholding the unemployment compensation provisions of the Social Security Act of 1935).

Durable and canonical constructions can be limited, overthrown, repealed, or made irrelevant. But this takes sustained effort over periods of time. This is the connection between durability, canonicity, and the processes of constitutional change I identify with living constitutionalism. The process of living constitutionalism not only features durable and canonical constructions in particular eras, but the gradual replacement or supplementation of some constructions with new ones over time. Thus, one way of understanding living constitutionalism is the process by which some durable and canonical constructions become embedded, extended, and supplemented in constitutional culture, while others are slowly limited, expunged, or made practically irrelevant.

*Griswold v. Connecticut*¹³⁵ and *Eisenstadt v. Baird*¹³⁶ are durable and canonical constructions, in part because of the success of the sexual revolution. Likewise, the Voting Rights Act¹³⁷ is durable and canonical: even though parts of it must be renewed by Congress, it is currently unthinkable that Congress would not renew it. Because of changes in social attitudes about homosexuality, and new social practices around which people have organized their lives, *Lawrence* is clearly canonical, as mentioned above, and is probably already durable. Like *Griswold* and *Eisenstadt*, *Lawrence* is an example of how living constitutionalism and the concepts of durability and canonicity are always in dialogue with social norms and mores. People are not actively trying to overturn *Lawrence*; no major political figure in 2009 seeks to reinstate the sort of criminal penalties for homosexual conduct that politicians might have supported in the past. Instead, the debate over gay rights has moved on to issues of same-sex marriage and employment discrimination.

Durable and canonical constitutional constructions like *Griswold* or the Voting Rights Act become part of the “constitutional catechism” that all Supreme Court Justices who seek confirmation must accept as valid.¹³⁸ The constitutional catechism is important because it suggests that there are a series of decisions, institutions, and statutes that have been so accepted by the public and by political elites that no judicial nominee can be confirmed if he or she would threaten their continuation. Judge Robert Bork failed confirmation in 1987 in part because people could not be sure that he accepted the legitimacy of *Griswold*.¹³⁹ Canonical and durable constructions shape judi-

¹³⁵ 381 U.S. 479 (1965).

¹³⁶ 405 U.S. 438 (1972).

¹³⁷ Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. § 1973 (2006)).

¹³⁸ See Jack M. Balkin, *The Constitutional Catechism*, Balkinization, Jan. 11, 2006, <http://balkin.blogspot.com/2006/01/constitutional-catechism.html>.

¹³⁹ See DAVID J. GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF *ROE V. WADE* 671 (1994); Lackland H. Bloom, *Twenty-Fifth Anniversary of Griswold v. Connecticut and the Right to Privacy: The Legacy of Griswold*, 16 OHIO N.U. L. REV. 511, 542–43 (1989); David J. Garrow, *Abortion Before and After Roe v. Wade: An Historical Perspective*, 62 ALB. L. REV. 833, 843

cial appointments, a key element of the process of living constitutionalism; their effects on judicial appointments, in turn, reinforce their canonical and durable character.

Canonical constructions that are not durable can affect judicial appointments in a different way: social movements press to reshape them or even overturn them. *Roe v. Wade* is clearly canonical, because it creates problems that people feel they must discuss and resolve. But it is not yet durable because people have not given up fighting about whether to overrule it. Every Supreme Court appointment since the 1980s has occurred in the shadow of the struggle over this most canonical of contemporary constructions.

Living constitutionalism is a system of constitutional development that produces new constitutional constructions. This system of constitutional development did not emerge all at once; rather, it evolved through the interaction of the basic framework created by the Constitution and its amendments with constitutional constructions that were added at various points in time. The system of living constitutionalism not only produces new doctrines and institutions; it also creates its own set of secondary rules—that is, ways for building new constitutional constructions. Bruce Ackerman has pointed out, for example, that our methods of constitutional development have become increasingly nationalist over time.¹⁴⁰ Constitutional amendment under Article V requires the concurrence of three quarters of state legislatures, almost all of which are bicameral, thus creating many different ways to defeat amendments. In the twentieth century, America has increasingly shifted toward nationalist forms of constitutional construction as the central method of constitutional development: judicial decisions by federal courts, federal framework statutes, and the creation of new federal institutions.

These emerging forms of constitutional construction developed together in response to each other. For example, the development of federal judicial doctrine greatly accelerated after the Civil War—and especially during the twentieth century—because of five key features. The first was the ratification of the Fourteenth Amendment, which required that state and local governments adhere to basic rights guarantees. The Fourteenth Amendment made it easier for the federal courts to supervise local and regional majorities and keep them in line with the values of the national political coalition. During the late nineteenth century, the federal courts promoted economic nationalism; during the middle of the twentieth century, they promoted federal civil rights. A second and related phenomenon was the Republican Party's decision to greatly expand the jurisdiction of the federal courts after the Civil War. This increased the number of times that

(1999); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CAL. L. REV. 1323, 1409 (2006).

¹⁴⁰ 2 ACKERMAN, *supra* note 35, at 16–23; Ackerman, *supra* note 31, at 1754, 1761, 1775.

federal courts would pass on constitutional issues and thus, in the long run, increased the chances for doctrinal development, elaboration, and proliferation.¹⁴¹

A third feature was the development during the twentieth century of new institutions of civil society that promoted constitutional litigation as a method of social change and appointment of judges as a key goal of electoral politics. These civil society institutions, as Steven Teles has described, created new forms of ideological and partisan competition outside the electoral system that helped change constitutional culture and professional reasoning.¹⁴²

A fourth key element was the rise of the administrative and welfare state during the twentieth century. This greatly increased the amount of legislation as well as the number of administrative regulations. Statutes and administrative decisions are the building blocks of new constitutional constructions by the political branches. Rising amounts of legislation and regulation, in turn, increased the number of possible occasions for litigants to raise constitutional and administrative challenges and the number of opportunities for federal courts to develop and proliferate doctrine.

Finally, the rise of an administrative and welfare state also meant that Congress and the President increasingly created new agencies, institutions, and practices that changed the structures of government on the ground. New landmark and framework statutes created an elaborate legal and institutional infrastructure that shaped the Constitution-in-practice. Following their customary role, courts were called on to rationalize, legitimate, and regulate this burgeoning regime, leading not only to increased work for themselves but also increasing their responsibility and their power. The New Deal, for example, created a large federal bureaucracy, new social programs, and new institutional structures. Courts justified and legitimated these changes in governance, but in the process began to subject them to procedural and constitutional norms, thus proliferating judicial precedents and constitutional constructions.

Continuous interaction, cooperation, and contest between the Judiciary and the political branches have created ever new opportunities for new constitutional constructions outside the amendment process. Thus, although the twentieth century has featured no less than twelve Article V amendments, focusing only on these amendments does not offer an accurate portrait of the key changes in American constitutionalism of the past hundred years. For example, these amendments say little about the growth of the

¹⁴¹ See Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875–1891*, 96 AM. POL. SCI. REV. 511, 515–17 (2002) (showing how late nineteenth-century Republicans expanded federal court jurisdiction to promote their policy goals and entrench their party); cf. RAN HIRSCHL, *TOWARDS JURISTOCRACY* 39 (2004) (noting how politicians in many different countries profit “from an expansion of judicial power”).

¹⁴² See STEVEN TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT* 6–21, 265–74 (2007).

administrative and welfare state, the expansion of presidential power, the creation of a National Security State, or the civil rights revolution.¹⁴³ Constitutional construction has become the dominant form of constitutional development today, because previous constructions during the twentieth century have made available so many new methods of constitutional change that can be more efficient, narrowly tailored, and agile than Article V amendment.

III. LIVING CONSTITUTIONALISM AND DEMOCRATIC LEGITIMACY

Let me summarize the argument so far: Constitutional development outside the amendment process is the work of constitutional construction. Constitutional construction involves both the political branches and the courts. Constitutional construction by courts, in turn, is largely responsive to larger changes in political culture, public opinion, and the work of the political branches. What we call “living” constitutionalism is really the product of constitutional construction and changes in constitutional construction over time. For this reason it is what Robert Post and Reva Siegel call a “democratic constitutionalism”¹⁴⁴ because constitutional doctrine is responsive to the social and political mobilizations and counter-mobilizations that promote popular ideas of the Constitution’s values, and to the views of popularly elected national political elites. Change occurs (1) because of changes in constitutional culture—what ordinary citizens and legal and political elites believe the Constitution means and who they believe has authority to make claims on the Constitution; (2) because of changes in political institutions and statecraft, which courts normally make sense of and legitimate; and (3) because of changes in judicial personnel (and hence their views of the Constitution). The latter changes are due to the judicial appointments process, which is controlled by elected officials—particularly the President and the Senate—who in turn respond to existing political pressures and incentives.

One might make two objections to this account of living constitutionalism. The first is that it is insufficiently legal—that it gives too much power to cultural and political influences, the national political process, political mobilization, and partisan entrenchment, rather than reasoned development of doctrine by courts. The second is that the account is insufficiently political. If the Supreme Court responds to changes in public opinion and political configurations, why not eliminate the middleman and dispense with

¹⁴³ See Bruce Ackerman, *Oliver Wendell Holmes Lecture: The Living Constitution*, 120 HARV. L. REV. 1737, 1738–44 (2007) (“We have lost our ability to write down our new constitutional commitments in the old-fashioned way.”).

¹⁴⁴ Robert C. Post & Reva B. Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 374–76 (2007); see also FRIEDMAN, *THE WILL OF THE PEOPLE*, *supra* note 38 (arguing that the history of the Supreme Court demonstrates democratic constitutionalism).

judicial review entirely? I respond to the first objection in Part III.A and to the second objection in Part III.B.

A. *Courts Are Bad at Tackling, Good at Piling On*¹⁴⁵

One might argue that courts should be, in Ronald Dworkin's words, "the forum of principle."¹⁴⁶ They should take the lead on questions of rights, justice, and constitutional structure, rather than letting constitutional development be guided or pushed by political and social movements. But this is a false dichotomy. The locus of constitutional change occurs simultaneously in the courts, in the political branches, and in the public sphere. History teaches us that courts normally do not engage in significant changes in constitutional doctrine without lengthy prodding from a sustained campaign by social movements and political parties.¹⁴⁷ Such campaigns generally employ not only litigation but also political mobilization and cultural and social persuasion. The long march of progressivism that led to the New Deal revolution and the even longer march that led to the civil rights revolution are two obvious examples, but the same could be said of almost every important transformation in constitutional doctrine in the country's history. If one admires these achievements of living constitutionalism, one must pay proper respects to the social and political mobilizations that preceded them.

Brown v. Board of Education did not arise full-blown from the head of Earl Warren; it was the result of a several decades-long campaign, well documented by historians, in which the Supreme Court made only sporadic and not always helpful appearances.¹⁴⁸ World War II and the Truman Administration were crucial events, and, as previously noted, President Truman asked the Court to overrule *Plessy v. Ferguson*¹⁴⁹ four years before it actually got around to doing so.¹⁵⁰ State courts and state legislatures, especially in the North, were also particularly important in the lengthy process of changing constitutional culture leading up to *Brown*.¹⁵¹ Constitutional innovations in state and local law usually precede the U.S. Supreme Court's entree into a new area.

One might worry that social movements and political parties will shape constitutional culture poorly without the careful and regular guidance of wiser courts. But whether one likes it or not, courts generally do not pay much attention to constitutional claims until social and political mobilizations get behind them, including the claims that are now the foundation of

¹⁴⁵ Balkin, *supra* note 36, at 1546.

¹⁴⁶ Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469 (1981).

¹⁴⁷ For general discussions of this point, see Balkin, *supra* note 36; KLARMAN, *supra* note 40.

¹⁴⁸ The story is told in KLARMAN, *supra* note 40.

¹⁴⁹ 163 U.S. 537 (1896).

¹⁵⁰ See Klarman, *supra* note 85.

¹⁵¹ See, e.g., *Perez v. Lippold*, 198 P.2d 17 (Cal. 1948) (holding that an antimiscegenation law violated the federal Equal Protection Clause).

today's constitutional doctrines. The work of social movements and political parties in making claims, taking positions, and trying to persuade others that their views are correct is crucial to constitutional development. That is because courts generally will not engage in constitutional innovation until political success changes the composition of the Judiciary or alters the political and constitutional culture in which courts make their decisions.

Courts usually do not get involved in developing new constitutional doctrines—whether about gun rights or gay rights—until political forces are strong enough to make them sit up and take notice. The great irony of the *Carolene Products*¹⁵² doctrine that the courts will look out for the interests of “discrete and insular minorities” is that no group gets recognized as “discrete and insular,” and therefore deserving of judicial protection, until it has gained the attention of political majorities.¹⁵³ Until it gains some political clout, a minority group is usually simply ignored. Blacks got increasing attention from the courts after black migration to the North and to urban areas made them swing voters who could influence elections,¹⁵⁴ and after Jim Crow became an embarrassment to the American foreign policy establishment during the Cold War.¹⁵⁵ Blacks made progress in the courts, in other words, because they made political progress through a halting and agonizingly slow process. (Of course, the one place blacks made little or no progress was in the South, and the civil rights revolution essentially imposed a national majority's views about race on the country, displacing those of a regional majority in the South.)

The Court's sex discrimination decisions of the 1970s followed an enormous groundswell of support for sex equality in popular culture and social movement mobilization (not to mention passage of the ERA by overwhelming margins in both houses of Congress in 1972).¹⁵⁶ From 1921 in *Adkins v. Children's Hospital*¹⁵⁷ until the 1970s, the U.S. Supreme Court pretty much stayed out of the gender equality business (there are two cases, *Goesaert v. Cleary*¹⁵⁸ in 1948 and *Hoyt v. Florida*¹⁵⁹ in 1961, both treating sex equality claims dismissively).

Finally, the Supreme Court's recent decision in *District of Columbia v. Heller*, although written in the language of originalism, is actually a classic

¹⁵² *United States v. Carolene Prods. Corp.*, 304 U.S. 144, 152 n.4 (1938).

¹⁵³ See Balkin, *supra* note 36, at 1551–58; KLARMAN, *supra* note 40, at 450.

¹⁵⁴ KLARMAN, *supra* note 40, at 100–03.

¹⁵⁵ MARY DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* 80–81 (2000).

¹⁵⁶ Congress sent the ERA to the States in 1972 by a vote of 354–24 in the House and a vote of 84–8 in the Senate. 117 CONG. REC. 35815 (1971) (House); 118 CONG. REC. 9598 (1972) (Senate).

¹⁵⁷ 261 U.S. 525, 553 (1923) (striking down a minimum wage law for women under Due Process Clause, while noting “the great—not to say revolutionary—changes which have taken place . . . in the contractual, political and civil status of women, culminating in the Nineteenth Amendment”).

¹⁵⁸ 335 U.S. 464 (1948) (upholding prohibition on female bartenders).

¹⁵⁹ 368 U.S. 57 (1961) (upholding the automatic exclusion of women from juries).

example of the processes of living constitutionalism in operation. Doctrinal recognition of an individual right to own guns for self-defense arose only after both political culture and political elites supported the right. For many years the conventional wisdom following the passage of the 1934 National Firearms Act¹⁶⁰ during the New Deal was that the Second Amendment did not guarantee an individual right to use guns for self-defense. In 1991, for example, retired Chief Justice Warren Burger, a conservative establishment Republican, insisted that the individual rights view of the Second Amendment was “one of the greatest pieces of fraud—I repeat the word ‘fraud’—on the American public by special interest groups that I have ever seen in my lifetime.”¹⁶¹ Burger cast particular scorn on the efforts of the National Rifle Association (NRA) and other groups—which he pejoratively labeled “special interest groups”—to convince Americans otherwise.¹⁶²

The modern movement for gun rights arose in reaction to increased political mobilization for stricter gun control laws, particularly after passage of the 1968 Crime Control and Safe Streets Act,¹⁶³ which Congress enacted following the assassinations of Martin Luther King and Robert F. Kennedy.¹⁶⁴ Beginning in the 1970s, the NRA, which had previously acquiesced in some gun control legislation and formed alliances with hunters and conservation groups, changed its leadership. It began aggressive national lobbying efforts to oppose gun control legislation. It negotiated the tension between gun rights and conservative demands for “law and order” by distinguishing between law-abiding citizens who had rights to guns for self-defense and criminals who had no rights.¹⁶⁵

The NRA’s new position on gun rights quickly gained influence within the Republican Party, as New Right leaders like Richard Viguerie recognized that gun rights could play a key role in the emerging culture wars over abortion, women’s rights, homosexuality, affirmative action, and pornography.¹⁶⁶ Movement conservatives who had previously used originalism to attack liberal judicial decisions, now turned to originalism to defend Second Amendment rights.¹⁶⁷ As conservatives gained increasing political influence during the last decades of the twentieth century, the NRA’s

¹⁶⁰ 48 Stat. 1236 (1934) (codified at 26 U.S.C. §§ 5801–22 (2006)).

¹⁶¹ *MacNeil/Lehrer NewsHour: Interview by Charlayne Hunter-Gault with Warren Burger* (PBS television broadcast, Dec. 16, 1991) (Monday transcript #4226), available in LEXIS, News Library, NewsHour with Jim Lehrer File.

¹⁶² *Id.*

¹⁶³ The Omnibus Crime Control and Safe Streets Act of 1968, Pub.L. 90-351 (codified at 42 U.S.C. § 3711 (2006)).

¹⁶⁴ The paragraphs that follow draw on the excellent discussion in Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191 (2008).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ See, e.g., STAFF OF SUBCOMM. ON THE CONSTITUTION OF THE S. COMM. ON THE JUDICIARY, 97TH CONG., THE RIGHT TO KEEP AND BEAR ARMS (COMM. PRINT 1982).

constitutional position gained increasing public support, and convinced members of a newer generation of conservative legal elites. In 1994, the Republicans took control of both Houses of Congress by making their opposition to recent gun control laws passed by a Democratic-controlled Congress a key campaign issue.¹⁶⁸

In her study of the contemporary constitutional movement for gun rights, Reva Siegel has pointed out that during the 1980s the NRA emphasized a republican or insurrectionist theory of the Second Amendment—that protected the right of citizens to resist a tyrannical government—and had flirted with the radical militia movement.¹⁶⁹ Following the Oklahoma City terrorist bombings in 1995, however, the militia movement came under strong public criticism.¹⁷⁰ The NRA quickly distanced itself from the militia movement; it promoted gun rights as an element of the culture wars and increasingly emphasized that law-abiding citizens had the right to have weapons for self-defense in the home to protect themselves against criminals.¹⁷¹ This also became the view of the conservative movement in the Republican Party. In May 2002, Attorney General John Ashcroft announced the Bush Justice Department's official position that the Second Amendment protected an individual right to use arms in self-defense.¹⁷²

Justice Scalia's majority opinion in *Heller* largely followed the emerging public vision of gun rights, the NRA's shift away from the insurrectionist theory, and the NRA's emphasis on the distinction between law-abiding citizens and criminals.¹⁷³ Thus, his opinion effectively elevated the self-defense theory over the insurrectionist theory of the Second Amendment, although the latter theory has far more historical support in the period leading up to ratification.¹⁷⁴ The evidence for a constitutional right of self-

¹⁶⁸ See Nicholas J. Johnson, *A Second Amendment Moment: The Constitutional Politics of Gun Control*, 71 BROOK. L. REV. 715, 779–83 (2005).

¹⁶⁹ Siegel, *supra* note 164, at 228–29.

¹⁷⁰ *Id.* at 230–31.

¹⁷¹ *Id.* at 231–32.

¹⁷² See, e.g., Linda Greenhouse, *U.S., in a Shift, Tells Justices Citizens Have a Right to Guns*, N.Y. TIMES, May 8, 2002, at A1. Meanwhile an outpouring of new legal and historical scholarship began debating the individual rights interpretation in the 1990s and 2000s, and the Third Edition of Professor Laurence Tribe's Treatise, *American Constitutional Law*, published in 2000, argued—in contrast to the two previous editions—that the Second Amendment protected an individual right. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-11, at 901–02 n.221 (3d ed. 2000).

¹⁷³ *District of Columbia v. Heller*, 128 S. Ct. 2783, 2816, 2821 (2008) (restricting the right to “law-abiding” citizens).

¹⁷⁴ See, e.g., MARK TUSHNET, OUT OF RANGE: WHY THE CONSTITUTION CAN'T END THE BATTLE OVER GUNS 25–26 (2007) (noting that evidence at the Founding for a “pure” individual right of self-defense unconnected to citizen militias is equivocal but evidence of some form of republican or citizen-militia theory is far stronger); Akhil Reed Amar, *Heller, HLR, and Holistic Legal Reasoning*, 122 HARV. L. REV. 145 (2008) (noting evidence for republican or citizen-militia theory at Founding and only indirect evidence for incorporation of common law right of self-defense).

defense becomes stronger during the nineteenth century.¹⁷⁵ In fact, perhaps the strongest originalist argument comes not from the original understanding of the Second Amendment but from its subsequent incorporation in the Privileges or Immunities Clause of the Fourteenth Amendment.¹⁷⁶

Scalia's majority opinion in *Heller* emphasized the right of law-abiding citizens to keep guns in their home and strongly suggested that felons will have no Second Amendment rights.¹⁷⁷ In fact, near the end of his opinion he acknowledged that modern developments in weaponry may have made the Second Amendment's original purpose of allowing citizen militias to overthrow a tyrannical government completely irrelevant.¹⁷⁸ Nevertheless, he insisted that the Second Amendment remains necessary to protect the right of self-defense in the home.¹⁷⁹ This conclusion perfectly reflects the transformation of the NRA's arguments following the Oklahoma City terrorist attack.

In this respect, the result in *Heller* was not entirely surprising. As in *Brown v. Board of Education*, the 1970s sex equality cases, and *Lawrence v. Texas*, the Supreme Court has kept its interpretation of the Constitution in line with changing public values. Another name for this phenomenon is living constitutionalism.

There is no plausible account of living constitutionalism that does not involve the Court responding to popular culture, social movement mobilization, and electoral politics. Popular constitutionalism and partisan entrenchment drive doctrinal development. Doctrinal development, in turn, shapes the direction of social movement and political activism. It does this sometimes by changing facts on the ground, sometimes by shaping popular consciousness, sometimes by opening up new channels and opportunities for constitutional claims, and sometimes by spawning backlash and counter-mobilizations that attempt to discipline the courts and change their direction. Constitutional politics influences constitutional courts; and in turn constitutional courts influence constitutional politics—both by what courts do and by what they refrain from doing.

¹⁷⁵ See *Heller*, 128 S. Ct. at 2803–12 (describing nineteenth-century evidence); David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359. Both Kopel and Justice Scalia, it should be noted, believe that this evidence helps prove the case for the Founding as well.

¹⁷⁶ See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 52, 145–62, 257–68 (1998) (noting an increasingly individualist interpretation of the Second Amendment in the years leading up to Reconstruction); Amar, *supra* note 174 (arguing for constitutional right to self-defense under the Fourteenth Amendment's Privileges or Immunities Clause).

¹⁷⁷ *Heller*, 128 S. Ct. at 2816–17 (“[N]othing in our opinion should be taken to cast doubt on long-standing prohibitions on the possession of firearms by felons and the mentally ill.”).

¹⁷⁸ *Id.* at 2817 (“It may well be true today that a militia, to be as effective as militias in the 18th century, would require sophisticated arms that are highly unusual in society at large. Indeed, it may be true that no amount of small arms could be useful against modern-day bombers and tanks. But the fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of the right.”).

¹⁷⁹ *Id.*

Not all of the action occurs in the political arena. Courts have plenty to do in shaping constitutional culture. They have to hear cases and decide them, creating new doctrinal distinctions that become the basis for later litigation and contestation. Through their opinions, courts influence public opinion, but not always as they intend. They may provoke reaction as much as they educate or enlighten. By declaring what is legal and illegal, which claims are plausible and which are “off-the-wall,” court decisions reshape the terrain of politics and political meanings; they create new opportunities for political entrepreneurs, both those who support judicial decisions and those who oppose them.

Above all, courts translate constitutional politics into constitutional law. They really cannot help themselves, or more correctly, the work of a collection of Justices on a multimember court like the U.S. Supreme Court cannot help but produce this effect. The Justices do this not because they are more intelligent, or more noble, or more farsighted, or more principled, or more sober than the rest of us. Rather, they translate constitutional politics into constitutional law because of how they get their jobs and because they inhabit professional roles in which they must continually hear claims and articulate their answers in terms of the forms, practices and arguments of professional legal culture.

B. Eliminate the Middleman?

In living constitutionalism, popular mobilization, constitutional constructions by the political branches, and partisan entrenchment in the Judiciary play a major role in shaping constitutional change. The democratic legitimacy of this system of constitutional construction rests on the fact that, in the long run, it is democratically responsive. In this way, the process of constitutional construction, mediated through the three branches of the federal government, respects popular sovereignty. However, this raises a second objection. If constitutional change responds to political mobilizations, social movement activism, new forms of governance, presidential appointments strategies, and shifts in popular opinion, what is the purpose of having constitutional courts in the first place? Why not just get courts out of the business of holding anything unconstitutional and exercise judicial restraint in almost every case?¹⁸⁰ If the system of living constitutionalism gains its legitimacy from its democratic responsiveness, why not eliminate the middleman? Why not leave all constitutional development to the majoritarian political process?

To answer this question, consider some key features of the system of living constitutionalism. First, its effects tend to be conservative (in a political rather than ideological sense) because Justices reflect the views of political coalitions that put them in office when they were appointed. On a

¹⁸⁰ For an argument along these lines, see Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 31 (2005).

multimember court, that means that its members represent a variety of different positions, strewn across time. Partisan entrenchment in the Judiciary tends to prevent quick and drastic changes in governance because it requires that political majorities win for sustained periods of time before they can change the legal culture and appoint new judges who will go along with their innovations.

Second, these features add an additional supermajoritarian requirement to already supermajoritarian features of American democracy. They create an additional veto point in the system: laws not only have to pass Congress and the President (or the state legislature and the Governor) but also the scrutiny of a court whose members were appointed by people at different times with very different political views.

Due to these conserving and supermajoritarian features, living constitutionalism creates a bias toward preserving the constitutional values of the political status quo. If the vector sum of political forces changes swiftly on a constitutional issue, the courts will tend hold back and resist the views of the day until the change in constitutional culture proves lasting, in part because it will take time for new judges to replace older ones.

These features of living constitutionalism share something in common. They are basic features of constitutionalism generally. Constitutionalism channels and disciplines present-day majorities through supermajoritarian rules that they cannot easily change overnight (but can change eventually); this prevents drastic changes in governance and keeps temporary majorities from altering or subverting the constitutional values of more temporally extended supermajorities. The system of living constitutionalism—like all constitutionalism—channels and disciplines ordinary politics by restraining simple majoritarianism.¹⁸¹

Living constitutionalism sits squarely between two extremes: It incorporates significant aspects of democratic politics in producing constitutional constructions over time, yet it also maintains the benefits of supermajoritarian constitutionalism. First, it requires fidelity to the hard-wired features of the Constitution absent an Article V amendment. Second, it requires political victories sustained over a long period of time to change existing understandings of the Constitution's text and structure that have been filled out through past constitutional construction.

Living constitutionalism allows social and political mobilizations to shift the interpretation and application of abstract clauses and open-ended features of the Constitution. But, for the most part, living constitutionalism

¹⁸¹ One additional feature concerns federalism. Because the federal courts are appointed by the national political process, they will tend to keep regional majorities close to the views of the dominant national political coalition. That is to say, the federal courts and the Supreme Court in particular are not so much countermajoritarian as they are nationalist. See Balkin, *supra* note 36, at 1538–46. However, the values of a national political coalition, as James Madison argued, may often be more moderate and better protect the rights of minorities than those of a smaller, more homogenous political community. THE FEDERALIST NO. 10 (James Madison).

has not altered the hard-wired features of the Constitutional text. (To the extent the latter has happened, it is really quite exceptional, and, I think, quite wrong.)¹⁸² This approach is consistent with what I have called framework originalism: It is faithful to the Constitution's original meaning but not necessarily the original expected application of the text. Long-term changes in constitutional culture can move us from *Plessy v. Ferguson* to *Brown v. Board of Education*, but they won't allow a thirty-four-year-old President, or three Houses of Congress, or a simple majority of one House to overturn a presidential veto. While Article V amendment is necessary for changing these hard-wired features of the Constitution, the interpretation, implementation, and application of vague and abstract terms like "equal protection" can and does change through sustained political mobilization.

Not surprisingly, fights between so-called originalist and living constitutionalist approaches almost never concern the hard-wired features of the Constitution. Instead, they almost always concern the Constitution's abstract guarantees and its silences. Most living constitutionalists assume that the hard-wired features of the Constitution are binding today even though they were created a long time ago. They do not object to the dead hand of the past with respect to those features; their concern is primarily the construction and interpretation of those clauses and features that use the language of general principles and standards. Living constitutionalists argue that we are not bound by how the generation of 1791 or 1868 would have applied the text. I agree. It is our job to interpret the text in our own time.

Under this model of living constitutionalism, successive generations may not reject the Constitution's text and principles, but they may decide how best to honor, implement, and apply them through constitutional constructions and doctrinal implementations. We can reject *Plessy v. Ferguson*, which is simply one generation's attempt at implementing the Constitution, but not the words of the Equal Protection Clause.

This model produces a system of judicial interpretation that is responsive to democratic politics in the long run but not directly controlled by it in

¹⁸² For example, the Supreme Court's Eleventh Amendment jurisprudence beginning with *Hans v. Louisiana*, 134 US 1 (1890), seems to be inconsistent with the constitutional text: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign state." U.S. CONST. amend. XI. See *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991) ("[W]e have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms."). Current doctrine reads "citizens of another State" to include citizens of the same state, *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996), and also allows suits in equity through the fiction of suits against the state's attorney general, *Ex parte Young*, 209 U.S. 123 (1908). Perhaps the best defense of some kind of state immunity is a structural argument for protection of state sovereignty under the Tenth Amendment, see *Alden v. Maine*, 527 U.S. 706, 713–15 (1999), but it is not at all clear why structural considerations should produce the doctrine we currently have.

the short run. It preserves constitutional law's relative autonomy from everyday politics while making it responsive to constitutional politics.

The system of living constitutionalism maintains the benefits of constitutionalism while allowing adjustments in interpretation over time in the face of sustained democratic mobilization. This makes it far superior to Justice Scalia's version of originalism, which he must continually compromise with exceptions for all those "mistakes." It also makes it superior to a system of pure majoritarianism, which lacks constitutional guarantees of basic rights and limits on government.

Finally, this model of living constitutionalism features a system of judicial review but not a system of judicial supremacy. This distinction is crucial: Courts act as a stabilizing force, and hold officials—and especially executive officials—accountable to law, but they never have the last word. The purpose of judicial review in this model is to represent and protect in as legally principled a way as possible the constitutional values of temporally extended majorities, and to prevent drastic changes in those constitutional values unless there has been extended and sustained support for change that is reflected in long-term changes in constitutional culture.

Judges do not have to do anything special or out of the ordinary to participate in the process of living constitutionalism. They do not have to be politicians or moral theorists or divinities like Ronald Dworkin's Hercules.¹⁸³ They do not have to be Platonic guardians¹⁸⁴ or philosopher kings. They don't have to be smarter, wiser, more moral, or more farsighted than anyone else. All they have to do, once they get appointed, is to try to decide the cases according to law, in the best way they can.¹⁸⁵ If they just go about doing their jobs, they will, in spite of themselves, participate in the gradual translation of constitutional politics into constitutional law. Meanwhile the job of members of the political community is to criticize how judges interpret the law and to try to persuade judges and other citizens that their interpretations of the Constitution are the best ones.

IV. LIVING CONSTITUTIONALISM AS A PROCESS

A third objection to my account of living constitutionalism is that it does not advocate any particular substantive changes in the Constitution but merely describes the process through which constitutional development occurs. Defenders and critics of the living constitution have generally assumed that it is a philosophy of judging that purports to explain and justify how courts should interpret the Constitution. By contrast, I have empha-

¹⁸³ See DWORKIN, *supra* note 97, at 239–40 (1986); RONALD M. DWORKIN, *TAKING RIGHTS SERIOUSLY* 105–30 (1977).

¹⁸⁴ LEARNED HAND, *THE BILL OF RIGHTS* 73 (1958) ("For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not.").

¹⁸⁵ See FRIEDMAN, *THE WILL OF THE PEOPLE*, *supra* note 38; Barry Friedman, *The Importance of Being Positive: The Nature and Function of Judicial Review*, 72 U. CIN. L. REV. 1257, 1290 (2004).

sized the work of the political branches in living constitutionalism. I have also noted that the processes of living constitutionalism can produce changes in diverse directions and I have even pointed to *District of Columbia v. Heller* and *Lawrence v. Texas* as examples of living constitutionalism in action. How can this be an adequate account of living constitutionalism if it does not tell judges how to decide cases, or direct the proper path of constitutional construction?

People have often spoken of living constitutionalism as if it were an interpretive approach or method that judges could and should consciously follow, so that if judges employ it, they will arguably produce better or more just decisions.¹⁸⁶ Critics have argued, to the contrary, that living constitutionalism gives judges discretion to impose their personal preferences.¹⁸⁷ But my account does not offer particularized advice to judges, or give them suggestions that would better constrain them. It is an account, to borrow a phrase, of the processes of constitutional decisionmaking,¹⁸⁸ and their basis in democracy and in the ideals of popular sovereignty.

Even so, my account of living constitutionalism is neither merely descriptive nor purely external. To the contrary, it is normative and takes an internal perspective on the constitutional system, treating its norms as le-

¹⁸⁶ See, e.g., Mitchell N. Berman, *Originalism and Its Discontents (Plus a Thought or Two About Abortion)*, 24 CONST. COMMENT. 383, 391–95, 400–04 (2007) (discussing the method of living constitutionalism and its superiority to originalism and the method of text and principle); William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 438 (1986) (arguing that courts must look to what the Constitution's words mean today); Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 10 (1998) (“‘Living constitutionalism,’ . . . is the practice of interpreting the Constitution, usually in a nonhistorical way, to meet the needs of the present.”); Lawrence B. Solum, *Constitutional Possibilities*, 83 IND. L.J. 307, 315 (2008) (“In the choice between originalism and living constitutionalism as general methods of interpretation, it’s the method or practice (ranging across an action type) and not the individual decision (or action token) that counts.”); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 879 (1996) (arguing that common law methods both constrain judges and permit evolution); see also Charles A. Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673, 735–36 (1963) (arguing that judges must adapt constitutional provisions as society changes or the provisions will atrophy); cf. *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 442–44 (1934) (Hughes, C.J.) (arguing that “the great clauses of the Constitution must [not] be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them,” and calling for interpretation of the Constitution in light of changing times, and “a growing recognition of public needs”).

¹⁸⁷ See BORK, *supra* note 83, at 251–53 (explaining that nonoriginalist theories require judges to impose their moral views on democratic majorities in the absence of moral consensus and without any satisfactory theory of why judges have authority to do so); William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 693, 695 (1976) (versions of living constitutionalism which see judges as “the voice and conscience of contemporary society” allow judges to impose their personal and subjective moral views on the public); Scalia, *Common-Law Courts in a Civil-Law System*, *supra* note 24, at 38–39 (living constitutionalism empowers judges to engage in common law reasoning based on their views of desirable outcomes); Scalia, *supra* note 28, at 863 (nonoriginalism leads judges to mistake their preferences for fundamental rights and values).

¹⁸⁸ PAUL BREST, SANFORD LEVINSON, JACK M. BALKIN, AKHIL REED AMAR & REVA B. SIEGEL, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING* (5th ed. 2006).

gally binding. It focuses on the entire system of constitutional development, of which courts are only one part and considers that system's role in promoting democratic legitimacy.

A. *Individuals and Systems*

In evaluating a constitutional and political system, we can focus our normative judgments on what individuals in a system should do within the system or how the system operates as a whole. Sometimes we should focus on improving individual behavior, but sometimes the system is the proper focus. Suppose, for example, that we want to solve a problem of social coordination by designing an efficient market. We ask how its design and incentives produce certain types of results, and if it does not, we redesign the market and shape the incentives. We do not spend very much time giving advice to people in the market about how to behave so as to produce efficiency; rather, we assume that efficiency arises from the sum of their interactions and not from each of them following our advice about how to behave. In fact, it may be a mistake to focus primarily on advising individual people about how to behave in the market, although educating people about costs and benefits might be a good idea; so too might be educational campaigns to shape people's values and preferences.

Another example of a focus on systems is our Constitution's separation of powers. The Constitution tries to preserve republican government by balancing contrasting interests, under the assumption, as Madison put it, that enlightened statesmen (i.e., the sort who would respond to good advice) will not always be at the helm.¹⁸⁹ My account is of the same sort: it asks whether and how the structural features of the system of constitutional change—many of which developed over time—promote or detract from democratic legitimacy and popular sovereignty. It asks whether the system works regardless of whether judges, lawyers or political actors are wise or foolish, noble or base.

B. *Advice to Judges or Theory of Legitimacy?*

To be sure, most people have assumed that a theory of living constitutionalism must be a theory that tells judges, "Here's how to decide cases that come before you. Do this and don't do that." Why do people think this? Possibly it is because they think that originalism is just such a theory, and so they assume that living constitutionalism must be of the same kind, its mirror image. They are wrong about living constitutionalism. They are also wrong about originalism.

Originalism offers directives to judges about how to decide cases because it is a theory of what makes the constitutional system—and the institution of judicial review—legitimate. It argues that fidelity to the

¹⁸⁹ THE FEDERALIST NO. 10 (James Madison).

Constitution is necessary for democratic legitimacy. There are several different theories for why that is so, but perhaps the most familiar version is that the Constitution was created through an act of popular sovereignty and therefore we must preserve the meaning of the Constitution over time in order to respect the rule of law and preserve the democratic legitimacy of the initial act of lawmaking. If judges must adhere to original meaning, they will do their part to maintain the system's legitimacy.¹⁹⁰

Skycraper originalism closely connects what makes the constitutional system legitimate with instructions to individual judges about how to decide particular cases. But living constitutionalism may not work in the same way. Indeed, precisely because it is compatible with (and supplements) framework originalism, living constitutionalism may not offer much additional advice to the Judiciary beyond what framework originalism requires.

It certainly does not offer contradictory advice: judges in a system of living constitutionalism should, at a minimum, respect the original meaning of the Constitution and try to apply its underlying principles to present day conditions. Nevertheless the focus of living constitutionalism lies elsewhere. It concerns how the system as a whole works over long periods of time—why the cumulative processes that produce changing interpretations of the Constitution promote democratic legitimacy.

Why do I emphasize how the constitutional system actually changes? Ought implies can. Legitimacy depends on possibility. We cannot expect actors to do what is not possible for them to do. A causal and structural account of the constitutional system is a necessary precursor to any normative account of constitutional legitimacy.¹⁹¹ Sadly, much normative constitutional theory seems to ignore this crucial question. It assumes that if we just give judges the correct advice, and they follow this advice, the system as a whole will produce legitimate results. Conversely, any problems of legitimacy come from judges not following the theorists' advice. This approach does not always stop to ask whether individual judges on a multimember court could or would actually take the advice being offered, or, if they took it, whether the constitutional system as a whole would respond in the right way.

The work of a multimember court will not correspond to any coherent theory of advice directed at one individual. The cases will go all over the place: they will not correspond to any consistent methodology. To be sure, they may be consistent with the relatively modest requirements of framework originalism—fidelity to text and principle. But that version of origi-

¹⁹⁰ See, e.g., WHITTINGTON, CONSTITUTIONAL INTERPRETATION, *supra* note 29, at 111 (arguing from popular sovereignty and noting that “[t]raditional defenses of originalism often employ some version of a popular sovereignty argument”).

¹⁹¹ For arguments emphasizing the importance of positive constitutional theory to understanding the legitimacy of judicial review, see Balkin, *supra* note 36, at 1537, 1574–77; Friedman, *supra* note 185, at 1257–58, 1270–83, 1290; Mark A. Graber, *Constitutional Politics and Constitutional Theory: A Misunderstood and Neglected Relationship*, 27 LAW & SOC. INQUIRY 309, 312, 317–29 (2002).

nalism does not dictate the results of constitutional construction, and for a very large number of disputed cases, construction is the name of the game.

This does not mean that normative criticisms of judges and their decisions are useless or irrelevant to constitutional legitimacy. Quite the contrary: criticizing courts and pushing for different constitutional constructions is crucial to the legitimacy of the system. My point, rather, is that normative arguments about good judging and correct constitutional construction are not external to the system of constitutional change. They are part of the process through which change occurs and they help secure its democratic responsiveness. In a constitutional democracy like our own, citizens, judges, lawyers, and government officials continually make constitutional claims and continually argue for their preferred vision. The clash of opposed views about what the Constitution means and the clash of opposed positions about the authority of different actors in the system drives the system forward. Dispute is the engine of living constitutionalism.

When people argue with each other and try to persuade each other, they are helping to shape the constitutional culture in which citizens live and in which judges hear and decide cases. When people make arguments about judges' authority to interpret the Constitution, they are trying to influence their fellow citizens as well as judges. They are shaping the boundaries of the reasonable, the notion of what sorts of claims are "off-the-wall" and "on-the-wall" in the constitutional culture in which they live. Similarly, when political officials make legal arguments in public life, or when lawyers argue before courts, they are trying to persuade judges to rule their way, thus reshaping professional judgments and the constitutional culture of legal professionals. Indeed, we can define a constitutional culture to a significant extent by what claims both ordinary citizens and professionals regard as reasonable and unreasonable, "off-the-wall" and "on-the-wall." Citizens and professionals may differ in these judgments from time to time, but this is also an important aspect of constitutional culture, because it means that popular opinion and popular mobilizations may, over time, alter professional judgments.

Thus, in my account of living constitutionalism, normative argument about the Constitution is hardly futile. It is a central element of what makes a living Constitution live. Arguments about what the Constitution means and who has the authority to say what it means are important because they can persuade the actors in the system to think differently. They influence public opinion, the work of litigators and social movements, and the positions of politicians and political parties. These forms of influence—together with regular elections—produce new judicial appointments and can shape the views of judges who are already on the bench. Normative arguments about what the Constitution means occur in mobilization, political disputes, electoral politics, debates about judicial selection, and litigation campaigns. They are the stuff of constitutional culture and the drivers of constitutional change.

C. Keeping up with the Times?

Understood as an account of the processes of constitutional decision-making, living constitutionalism makes a great deal of sense. It also has the advantage of describing the actual history of our nation. Understood as a doctrine for correct judging, however, "living constitutionalism" is an under-theorized concept. One popular formula of living constitutionalism is that judges should adapt to changing conditions, reflect changing values, and generally keep up with the times. But such advice, directed at individual judges, is substantively empty. When judges leave issues up to the political process, they can view themselves as allowing that process to respond to changing values and times. (Think of the New Deal.) When judges discipline the political process through judicial review they can view themselves as maintaining constitutional commitments in order to respond to changing values and times. (Think of the civil rights revolution.)

It is by no means clear why individual judges have any such obligation or responsibility to "keep up with changing times" or "reflect changing values" instead of doing what they are supposed to do, which is interpreting and applying the law as best they see it. But even if judges had such a responsibility, there are many possible ways that one can "adapt to changing conditions," "reflect changing values," and "keep up with the times." One can "keep up with the times" as a liberal or as a conservative, as a secular person or as a religious person, as a technophile or as a technophobe. One simply does so in different ways. One can respond to changing times by changing one's values in the face of recalcitrant events, or by maintaining one's values in the face of trials and temptations. Civil libertarians argue for the latter position all the time, and there are many living constitutionalists among their number.

Moreover, whose account of "changing conditions," whose interpretation of "changing times," and whose version of "changing values" should judges look to? To my interpretation or to yours? Should they look to the values of contemporary liberals or contemporary conservatives? Both sets of values are constantly changing, and both of them are doing their very best to respond to changing times and circumstances.

These questions have no useful answers. Instead, a theory of living constitutionalism has a different project. It seeks to explain why certain features of the constitutional system may change while others remain the same, and why those features that change do so in a way that preserves the values of constitutionalism, the rule of law, and democratic authority. To offer a theory of living constitutionalism, one must understand how and why the Constitution lives, not simply advise it to shape up and live right.

*D. The Translation of Constitutional Politics into Constitutional Law:
On Horizontal and Vertical Translation*

In a system of living constitutionalism, lawyers and judges translate constitutional politics into constitutional law through their everyday professional tasks of litigating and deciding cases. This concept of translation is somewhat different from Lawrence Lessig's famous comparison between originalist judging and translating.¹⁹² Lessig argued that the right way for judges to be originalists was to analogize interpretation to the translation of an ancient text in a foreign language. Given changed circumstances, we should try to enter into the world of the past and translate the expectations of the Framers into our present day concerns.¹⁹³ Because I don't think we are bound by original expected applications, I don't accept Lessig's thesis on precisely the terms he offered it. Nevertheless, I think the metaphor of translation is powerful and evocative.

Lessig's model of translation was *vertical*, moving from past to present: we translate the thick set of beliefs and expectations surrounding an ancient text into today's meanings and applications. My account of translation is *horizontal*: judges respond to the political and constitutional culture of their day and recognize it in their work, whether consciously or unconsciously. In Lessig's model, translation was something that judges *should do*; in my model, it is something that judges *actually do*, whether they intend to or not. Judges engage in horizontal translation because of the way they are selected and the way that democratic politics shapes professional legal culture, legal argument, and legal decisionmaking. An originalist like Justice Scalia may insist that he is only following the commands of long dead Framers, but, willy nilly, he is channeling the values of the contemporary conservative movement. He has done so overtly in his many dissents, making direct appeals to the public and decrying the values of liberal elites, who, he believes, are out of touch with the contemporary sensibilities of ordinary Americans.¹⁹⁴

¹⁹² Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1996).

¹⁹³ *Id.* at 1184–85; see also Lawrence Lessig, *Fidelity in Translation: Fidelity and Constraint*, 65 FORDHAM L. REV. 1365, 1376 (1997) (“Our aim has, for the most part, been to extract normative significance from an ancient constitutional text and preserve that significance as much as possible.”).

¹⁹⁴ See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 602, 604–05 (2003) (Scalia, J., dissenting) (arguing that the Court, dominated by elite culture, “has largely signed on to the so-called homosexual agenda” and “that the Court has taken sides in the culture war”); see also Robert C. Post & Reva B. Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545, 566–68 (2006) (noting that Scalia in particular has “mobilized conservative constituencies to bring political pressure to bear on the development of constitutional law”). Scalia's constitutional theory holds that judges should not decide constitutional questions based on contemporary social values. See *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 1000 (1992) (Scalia, J., dissenting) (“How upsetting it is, that so many of our citizens . . . think that we Justices should properly take into account their views, as though we were engaged not in ascertaining an objective law but in determining some kind of social consensus.”). Nevertheless, his arguments often mesh with the values of conservative elites; indeed, he owes his Supreme Court appointment to the success of movement conservatism.

The word “translate” means to carry across, and lawyers’ arguments and judge’s decisions carry ideas, values, and commitments from the realm of politics to the realm of law. The work of judges and lawyers perpetually traverse the membrane that separates law from politics while simultaneously preserving that boundary by operating through professional rhetoric and norms. Judges and lawyers re-conceptualize the claims of constitutional politics in the materials of the law, transforming, professionalizing, and rationalizing them in the process. This process is horizontal translation, the translation of constitutional politics into constitutional law.

I emphasize the contributions of lawyers as well as judges because lawyers shape the claims of litigants and members of social movements and present them before the Judiciary. Litigation—and the resources devoted to litigation—shape the direction of constitutional construction, for judges cannot hear cases that are not brought to them.¹⁹⁵ Lawyers are the great translators of our political life, collecting the stories, claims and grievances of Americans and spinning them into the discourse of power that we call legal reason.

The past—and the meaning of the past—matter greatly in horizontal translation. Judges, lawyers, and their fellow citizens often reason with each other by invoking the past—not only the values, concerns, and hopes of the Framers, but also those of those of succeeding generations, like the generations of the New Deal, World War II, or the civil rights revolution. In fact, it often seems that between precedent and history, constitutional argument appears to be about nothing other than the past, albeit the nation’s entire past, not just the moment of the Founding. But people invoke the memory of the past in order to face each other in the present, and to reason about how to apply the Constitution in their own time. In a democracy like ours, moral and political disagreement is a fact of life. The past serves a crucial function: it provides a common stock of intellectual resources, values, and commitments that people with very different views can draw upon to reason with each other in a political community so that they can decide what to do and how to go forward.¹⁹⁶ People preserve democratic community and democratic legitimacy by using the past to decide what to do in the present. Constitutional doctrine translates these arguments and counter-arguments into constitutional law.

Courts must think and act in terms of legal forms and practices; they must make legal arguments and write legal opinions. Their job is not to do politics but to do law. Nothing in what I have said suggests that

¹⁹⁵ See CHARLES EPP, *THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE* (1998) (emphasizing the role of resources devoted to litigation and directed litigation campaigns in producing constitutional change); TELES, *supra* note 142 (emphasizing the role of nonelectoral competition by elites and institutions of civil society in reshaping constitutional culture).

¹⁹⁶ Jack Balkin & Reva B. Siegel, *Introduction to THE CONSTITUTION IN 2020* (Jack M. Balkin & Reva B. Siegel eds., forthcoming 2009).

judges should do anything but interpret and construct law. They should be faithful to text and principle and use the various modalities of argument—text, structure, history, precedent, prudence, and national ethos—to decide the cases before them. The work of translation and change will take care of itself without much effort on their part. They will disagree among themselves, often heatedly, about the direction in which doctrine should travel, but that by itself does not make the process of change illegitimate. Rather, this process of disagreement about the law over time—and the mutual recognition of opposing positions—is itself part of the process of horizontal translation that helps secure the democratic legitimacy of constitutional change through constitutional construction.

Through doing law (not politics) and working in tandem and in opposition with each other, successive generations of lawyers and judges inevitably translate changes in constitutional politics into constitutional law. They do so because new judges replace older ones, and because the judges who hear cases and decide them are influenced and shaped by the constitutional culture that they live in. This culture includes not only professional norms of what is “off-the-wall” and “on-the-wall” legally, but also popular notions of constitutional values that influence professional judgments. In this way living constitutionalism produces change that preserves legitimacy in a democratic society while allowing judges to continue being judges.

E. The Role of Dissent in a System of Living Constitutionalism

Individuals within the constitutional system will not always like how judges or the political branches engage in constitutional construction because the system will often produce constitutional changes that they do not agree with. Many people, perhaps most, instinctively associate “living constitutionalism” with whatever is liberal or progressive and therefore support or oppose it. But this characterization is incorrect. As noted previously, a Constitution that grows and changes in response to social and political mobilizations is as likely to move to the right as to the left. Indeed, it has moved in many different directions over the course of our nation’s history. Moreover, what we call “left” and “right” today are the products of coalition building—a configuration of contingent forces and events. The content of these ideas has been different and will be different again. Someday they may be replaced by other ideas and labels that will better describe the political disputes of the future.

The conservative dominance of the last forty years is an important example of the process of living constitutionalism at work, even though many of its proponents have fought under the banner of originalism. There is no contradiction here. Appeals to the values of the Framers or Founders are a pretty standard way that people call for restoration or redemption. Appeals to origins are a familiar way that people justify constitutional change out-

side of Article V (and change within it too). Like many revolutionary movements before it, the conservative movement of the late twentieth century has been predicated on a return to an imagined origin, a restoration of proper principles it claims that later generations have abandoned. There is nothing unusual about this: revolutions often use the tropes of return and restoration to promote what is actually change. The conservative originalism of the past several decades has been an attempt to replace a more liberal constitutionalism with a more conservative one. In many ways, it has succeeded. Whether liberal critics like it or not, this change is also an example of the living Constitution. In a conservative era, the positive constitutional law of a living constitution will become more conservative in many respects. That is how the Constitution “keeps up with the times” and “reflects changing values.”

Why should citizens recognize the legitimacy of this process if it generates constitutional constructions that citizens disagree with? They should recognize and respect it because it is the same process that produced constitutional constructions they also respect and admire. Each of us will find some decisions of the courts to disagree with, and others that we truly despise. But we must accept these decisions as law while working to change them over time through the processes of legal persuasion in the courts and political mobilization outside the courts. I can argue that these decisions are bad interpretations of the law and work to distinguish or overrule them, just as people who disagree with me can work to limit or overturn decisions that they do not like. The ability of citizens to talk back to courts—their ability to redraw the boundaries of what is reasonable and unreasonable through persuasion, protest, political action, and other forms of shaping popular opinion—is crucial to democratic legitimacy. Faced with a deeply unjust decision, *Dred Scott v. Sandford*, Abraham Lincoln once said that *Dred Scott* was law and should be respected until it was altered or overturned, but “we mean to do what we can to have the Court decide the other way.”¹⁹⁷ Here Lincoln articulated the basic premise of a living Constitution as a process: the Supreme Court’s decisions deserve respect as positive law, but not respect as proper interpretations of the Constitution, unless, in fact, they are the right interpretations. People can and should work to overturn decisions that, in their opinion, are contrary to the Constitution’s spirit, and to its text and its principles, through political mobilizations, through the appointments process and through legal arguments directed at judges and legal officials.

People who disagree with particular decisions must accept them as positive law, but need not accept them as correct. A system of living constitutionalism means that I can always dissent during “dark times” when my views are in the minority. I can try to persuade other people that my views

¹⁹⁷ Abraham Lincoln, Speech in Reply to Senator Douglas (July 10, 1858), in 1 ABRAHAM LINCOLN: COMPLETE WORKS 247, 255 (John G. Nicolay & John Hay eds., 1902) (1894).

are correct and work for the restoration or the redemption of important constitutional values. Through this agonistic process of mobilizations and counter-mobilizations of groups who seek the restoration and redemption of Constitutional values, the Constitution maintains its public acceptability.

Moreover, this process provides its own constraints on runaway construction by the courts and the political branches. As Reva Siegel has pointed out, both sides of a constitutional controversy must appeal to common values and common political goods in order to persuade the public that their views are correct. They must modify their positions to appeal to the values of the (imagined) center and, in the process, they often acknowledge and incorporate aspects of each others' views.¹⁹⁸ The clash of mobilization and counter-mobilization, the necessities of everyday politics, and the need to compromise and make positions palatable provide yet another checking function in our constitutional system, like the separation of powers itself. This does not make constitutional politics either principled or unprincipled; the point, rather, is that the content, scope, and effect of the constitutional principles that the political process produces are continually being reconceptualized and reconfigured in the crucible of democratic politics. We can see the reshaping of constitutional claims in the context of debates over racial equality, sex equality, free speech, and even the right to bear arms.¹⁹⁹ Contemporary liberal claims about the Constitution have been shaped by the conservative constitutional culture of our era, just as today's conservative constitutionalism reacted to and absorbed important features of the more liberal constitutional culture that preceded it.

F. *Living Constitutionalism and the Problem of Constitutional Evil*²⁰⁰

A final objection to my account of living constitutionalism is that the process I describe might lead to very bad and unjust results. My account of living constitutionalism may possess sociological legitimacy because constitutional construction follows public opinion. It may possess procedural

¹⁹⁸ Siegel, *supra* note 139, at 1403–19.

¹⁹⁹ See Balkin, *supra* note 36, at 1563–68 (describing a refashioning of constitutional claims by politics); Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927 (2006) (describing the role of social movements in shaping and reconfiguring constitutional claims in new factual contexts); Siegel, *supra* note 164 (describing changing social movement conceptions of the right to bear arms); Reva B. Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L.J. 1641 (2008) (describing changing forms of anti-abortion argumentation); Siegel, *supra* note 139 (describing the effects of 1970s mobilizations and countermobilizations on sex equality claims); Siegel, *Equality Talk*, *supra* note 117 (describing the effects of political struggle on the meaning of *Brown v. Board of Education*).

²⁰⁰ See MARK GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* (2006) (arguing that in interpreting constitutions justice must be sacrificed to secure a stable democratic politics); Jack M. Balkin, *Agreements with Hell and Other Objects of Our Faith*, 65 FORDHAM L. REV. 1703 (1997) (describing the problem of constitutional evil as how to be faithful to a constitution that might permit or require great evils).

legitimacy because constitutional construction employs standard forms of legal argument and because it is democratically responsive in the long run. Yet it may lack moral legitimacy because constitutional constructions can be very unjust; they can oppress minority groups and individual citizens, and undermine or even destroy democratic values.

A system of framework originalism and living constitutionalism may be democratically legitimate and still produce or countenance very unjust results that well-trained lawyers can defend using plausible legal arguments. This well describes most of American constitutional history. Throughout our history minorities have been badly treated and rights denied in ways that we would find completely unacceptable in a constitutional democracy today. This is not to assume that we inhabit a privileged position: no doubt future generations may think the same of some practices in our current political order.

As an example of what the processes of constitutional change described in this Article might lead to, consider the Bush Administration's claim—most often associated with Dick Cheney, David Addington, and John Yoo, that when the President acts in his capacity as Commander-in-Chief, he cannot be bound by Congressional enactments that seek to limit his powers. This includes, among other things, laws against domestic surveillance and even laws against torture and cruel and inhumane treatment.²⁰¹

The famous “torture memos” produced by the Office of Legal Counsel articulate this theory; they sound quite lawyerly, and they make coherent legal arguments, even if they are not very good arguments. They exemplify an important fact about legal discourse—that well-trained lawyers can make truly bad legal arguments that argue for very unjust things in perfectly legal-sounding language. No one should be surprised by this fact. Today lawyers make arguments defending the legality of torture and, indeed, claiming that laws that would prevent the President from torturing people are unconstitutional.²⁰² In the past lawyers have used legal-sounding arguments to defend the legality of slavery,²⁰³ Jim Crow,²⁰⁴ and compulsory sterilization.²⁰⁵

Elsewhere I have asserted that the Cheney/Addington/Yoo theory of presidential power, taken to its logical conclusions, allows Presidents to

²⁰¹ Memorandum from John C. Yoo, Deputy Assistant Att’y Gen., U.S. Dep’t of Justice Office of Legal Counsel, to William J. Haynes II, Gen. Counsel, U.S. Dep’t of Defense (Mar. 14, 2003), *available at* http://www.aclu.org/pdfs/safefree/yoo_army_torture_memo.pdf (arguing that statutes or treaties limiting interrogation and detention practices, including torture, would violate the President’s authority as Commander-in-Chief); Memorandum from the U.S. Dep’t of Justice Office of Legal Counsel to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), *available at* <http://www.washingtonpost.com/wpshr/nation/documents/dojinterrogationmemo20020801.pdf> (same).

²⁰² *Id.*

²⁰³ *Dred Scott v. Sanford*, 60 U.S. 393 (1857).

²⁰⁴ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

²⁰⁵ *Buck v. Bell*, 274 U.S. 200 (1927).

rule by decree (or indeed without decree) and is in this sense tantamount to presidential dictatorship.²⁰⁶ Such a theory has little basis in the original understanding of the Founding period, which feared the rise of a new Caesar or Cromwell; it is a product of the modern era.²⁰⁷ But even if we stipulate that it is a bad interpretation of the Constitution, could the courts adopt such a theory through the processes of living constitutionalism described in this Article? It is certainly possible that they could, for the President and his lawyers pushed it vigorously on many occasions. A few more Supreme Court appointments who saw things the President's way, and we might be well on our way to a conception of presidential power that would have been unimaginable only ten years before. As noted above, courts have made many bad and unwise decisions in our nation's history. Nobody should underestimate what lawyers in high places can do armed with legal language. But the more important question is whether the constitutional system as a whole can correct the excesses of such lawyers.

Ultimately, it is a question of design and faith in that design: whether a system of living constitutionalism such as we have can set ambition against ambition, mobilization against counter-mobilization, and judicial conservatism against political zeal in a way that preserves a decent society or at least helps us move haltingly toward a more decent one. The question is whether the system of living constitutionalism we have generated through years of construction is a worthy successor to the Framers' idea of separation of powers and checks and balances—a system that moderates, tests, and checks; and one that makes politics both possible and accountable to prudence and reason. This is a question of both reason and faith; of both practical knowledge and of moral commitment to preserving just institutions and working for better ones.²⁰⁸

It is possible, but very unlikely, that five Justices of the Supreme Court would adopt reasoning like that of the Torture Memos. Unlikely, because it would require the Justices to overturn a lot of precedent and disregard basic principles of the constitutional system. Possible, because the history of our country shows that constitutional culture can change greatly, given enough time. But the fact that courts make bad decisions, and even evil decisions, does not mean that the constitutional system as a whole becomes illegitimate. It just means that a particular decision is very wrong. The more im-

²⁰⁶ See Jack M. Balkin, *Reductio Ad Dictatorem*, Balkinization, Apr. 7, 2006, <http://balkin.blogspot.com/2006/04/reductio-ad-dictatorem.html>.

²⁰⁷ See David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 695–97, 800–04 (2008); David J. Barron & Martin S. Lederman, *The Commander in Chief at The Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941, 947–51, 1057–59, 1100 (2008); David Luban, *On the Commander in Chief Power*, 81 S. CAL. L. REV. 477 (2008).

²⁰⁸ See Balkin, *Constitutional Redemption*, *supra* note 3, at 427–28, 436–42; Balkin, *Respect-Worthy*, *supra* note 119, at 493–97; Jack M. Balkin, *The Declaration and the Promise of a Democratic Culture*, 4 WIDENER L. SYMP. J. 167, 175–80 (1999).

portant question is whether our constitutional system offers opportunities to correct bad judicial decisionmaking—through sustained criticism and protest, through changing people’s minds about what our Constitution requires, through political responses and political workarounds, and through the judicial appointments process. These features of political practice are part of the checks and balances of our constitutional system. We recognize them easily when the President and Congress are in conflict, but perhaps less easily when the courts are involved—perhaps because we think incorrectly that they have the last word on the meaning of the Constitution.

CONCLUSION

The system of living constitutionalism we have created has produced new checks and balances to buttress the ones provided in our original Constitution. It is a good thing, too. National power has increased, and with the blessing and support of the political branches the courts have become more important and more powerful. Institutions have grown up, politics has become more complex, and power can be asserted through ever new means. We are always in need of new ways for power to check power, and hold off the destruction of free government.

These same features of our political system offer us the means to prevent such bad decisions from occurring in the first place. Today nobody can be appointed to the Supreme Court who thinks that Jim Crow policies are constitutional. But that was not true through most of our country’s history. It only became true because of years of political and legal struggle.

If the Supreme Court adopted a theory of presidential dictatorship, it might send us spiraling down toward the end of our two-centuries-old constitutional experiment with democracy—a possibility that the Framers imagined but tried to forestall. Or it might not. The next administration might come along, take very different positions, and appoint new Justices who would distinguish the bad decision, or even overrule it. But in any case, it would not simply be a question of us waiting passively for the Court to decide our fates. There are things we might and should do to promote the restoration of proper constitutional government. The fact that the Constitution is in all of our hands, and not simply the hands of the Justices, is the reason why we have a living Constitution.